



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-06721
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

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

November 12, 2009

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant submitted his latest Security Clearance Application (SF-86) on December 7, 2007. On March 12, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline B (Foreign Influence). 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 the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on April 6, 2009, and requested a hearing before an administrative judge. DOHA assigned the case to me on July 28, 2009. DOHA issued a notice of hearing on August 14, 2009. I convened the hearing as scheduled on September 9, 2009. Government Exhibits (GE) 1 through 3 were admitted in evidence without objection. Applicant testified on his own behalf and submitted five

documents (AE A-E), which were admitted without objection. DOHA received the transcript of the hearing (Tr.) On October 17, 2009. Eligibility for access to classified information is granted.

Procedural and Evidentiary Rulings

Department Counsel requested that I take administrative notice of certain facts relating to Iraq (Tr.16). The request and the attached documents are included in the record as Hearing Exhibit I. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegations in ¶ 1.a and 1.b. He denied the other allegation (¶ 1.c) based on the fact that he did not agree with the amount of money he sends to his family in Iraq. His admissions are incorporated in my findings of fact. I make the following findings:

Applicant is a 42-year-old man who was born and educated in Iraq. He graduated from a technical institute. Applicant was drafted into the Iraqi military and served from 1987 until 1992 (GE 1). He fled Iraq in 1992, and lived in a refugee camp. Applicant requested to come to the U.S. (Tr. 27). He has lived in the United States since August 1992 (Tr. 27). He became a naturalized U.S. citizen in November 2000. In 2004, Applicant visited his mother and father in Iraq because they were ill (SOR ¶ 1.b). He has been employed with his current employer since October 2006 as a translator (GE 1). Applicant held an interim security clearance for almost three years. He is currently working in Iraq for the U.S. Government.

Applicant never married and has no children (GE 1). His mother died in 2005. His father died in August 2008 (Tr. 45). Applicant visited his father in Iraq before his death (Tr. 45). He spent two weeks in Iraq for the funeral. Applicant has three sisters and three brothers who are citizens and residents of Iraq (SOR ¶ 1.a). Applicant saw them at his father's funeral.

Applicant contacted his parents before they passed away approximately once or twice a year by telephone. He does not send emails. He had some contact with his siblings. They do not work and they have never had any affiliation with the government in Iraq. They support the U.S. efforts. They would like to live in the United States. Applicant acknowledged that he wants to obtain the necessary money to sponsor his family to immigrate to the United States.

Applicant's oldest sister is married. She does not work. His middle sister is married and her husband is a teacher in a public school (Tr. 59). His youngest sister is also married. Her husband is a teacher also. He does not email them. He does not send them money (Tr. 61).

Applicant's family does not know that he is a translator for the United States. Applicant told them he works for a plastics company in the United States. (Tr. 47). None of his family members have been the victims of violence or have been threatened due to Applicant's work for the United States.

Before his father died, Applicant sent him money for his health expenses (Tr. 50). He acknowledged that every three or four months he sent his parents \$200 or \$300 to aid in their health care expenses (SOR 1.c). Applicant has not sent any money to Iraq since his father died in 2008 (Tr. 51).

In 2006, Applicant served as an interpreter for the U.S. Army in Iraq. He remained in his position until he returned to the U.S. in 2009. He resides on U.S. military installations. He does not leave the compound. He is not permitted to visit his family while working as a translator (GE 3).

Applicant has no financial interests in Iraq. He has no desire to permanently return to the country. Applicant owns a home in the United States. He has no contact or affiliation with any former colleagues in Iraq.

Applicant asserted his pride of U.S. citizenship and love for his work with the Army (AE A). He worked in a war zone in Iraq. He worked long hours for six days a week. He went on missions with the U.S. Army. He has willingly put himself in danger every day for almost three years in order to help the United States. Applicant emphasized that he would never betray the United States.

There is no evidence in the record that Applicant breached any security policies or procedures while holding a security clearance in Iraq. He has letters of appreciation for his work in Iraq (AE C-D).

Applicant presented a 2009 recommendation from a sergeant major who serves with the U.S. Army in Iraq. Applicant has worked closely with his team since March 2006 for the Joint Special Operations Task Force. Applicant has provided total commitment to the mission. He has devoted thousands of man-hours to the ongoing war on terrorism and stability and support operations inside Iraq. His support has far exceeded the scope of his normal duties. He has played an intricate role in protecting U.S. soldiers from terrorist attacks, and his analytical input and understanding of the culture, history and geography of the country has contributed to the capture of those responsible for attacks (AE C).

Applicant has several recommendations from other personnel with the U.S. Army. He is lauded for his preparation and motivation. He is described as professional, reliable, and honest. He has consistently excelled under demanding conditions at risk to his personal safety (AE A). He is mature, which serves as an advantage. He works long hours at a tireless pace in an often thankless environment. He is a man of great courage and conviction.

An Army interrogator who has worked with Applicant and sees him on a daily basis does not doubt his competence or dedication. He believes Applicant is a true U.S. patriot. Applicant is the type of person that can be trusted with information (AE D).

Applicant's current employer vouches for Applicant's professionalism and work ethic. His skill set is second to none. He has the highest recommendation and his skills are greatly needed.

Applicant received several coins while serving as a translator in Iraq. He brought the two coins to the hearing. Applicant received them for his great work in Iraq (Tr. 24). He is noted for his outstanding support of a unit in Operation Iraqi Freedom. He was praised for his expert linguistic skill and professionalism in his duties from 2006 until 2009 (AE A-E).

I take administrative notice of the following facts about Iraq set forth in the Hearing Exhibits, including the fact that in 2003, the United States led a coalition to remove Saddam Hussein from power in Iraq. After free elections, Iraq's new government took office. Despite the elections and new government, Iraq remains engulfed in violence, perpetrated by Al Qaeda terrorists and other insurgents. Numerous attacks and kidnappings have targeted the United States Armed Forces, contractors, and other civilians, as well as Iraqis. Even with aggressive governmental action against terrorists, the threat of terrorism in Iraq remains. Terrorist groups can conduct intelligence activities as effectively as state intelligence services.

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 an 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 overarching adjudicative goal is a fair, impartial, and commonsense 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 an 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 an applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of an applicant. 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 an 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 an 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). “[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

Guideline B (Foreign Influence)

The SOR alleges Applicant has a father, three brothers, and three sisters who are citizens and residents of Iraq. (SOR ¶ 1.a). It also alleges Applicant traveled to Iraq in January 2004 (SOR ¶ 1.b), and that he sends about \$200 to \$500 monthly to his family in Iraq (SOR ¶ 1.c). The security concern relating to Guideline B is set out in AG ¶ 6 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.

A disqualifying condition may be raised by “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.” AG ¶ 7(a). A disqualifying condition also may be raised by “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.” AG ¶ 7(b). Applicant’s father died in 2008. Applicant sent his father money to help him with his medical expenses. Applicant’s brothers and three sisters are citizens and residents of Iraq. Applicant maintains some contact with them. He visited Iraq in 2004 before he was translator because his mother was ill. He returned to Iraq in 2008 for his father’s funeral. He took an assignment in Iraq as a translator, but he acknowledged that his family does not know about his work. Applicant’s connections to his family in Iraq could create a potential conflict of interest between his security obligations and his desire to help them, only in a situation wherein they were taken hostage or otherwise threatened with harm if he did not cooperate. None of them have any government connection or other position in which they could otherwise benefit from his access to sensitive information or technology. However, under either disqualifying condition, security concerns could arise in connection with the potential that hostile forces might seek protected information from Applicant by threatening harm to his family members in Iraq. Based on this evidence, AG ¶¶ 7(a) and (b) are raised.

Since the government produced evidence to raise the disqualifying conditions in AG ¶¶ 7(a) and (b), 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 never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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).

Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. 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.

Security concerns under this guideline can be mitigated by showing that "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." AG ¶ 8(a). 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). Similarly, AG 8(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." In 2004, Applicant visited his mother who was ill. At that time, he was not employed as an interpreter with his current employer. Applicant had telephone contact with his father approximately twice a year. Applicant attended his father's funeral in Iraq when his father died in 2008. The positions and activities of Applicant's siblings in Iraq do not involve the government or military and they would have no interest in acquiring protected information. Only their physical presence creates the potential that their interest could be threatened to the point that Applicant would confront a choice between their interest and those of the United States. Because they are opposed to terrorism in Iraq, the likelihood of such a situation is substantially reduced. The Iraqi government is a U.S. ally that does not pose an intelligence risk through Applicant's family members, who support the Iraqi and coalition efforts to defeat terrorists and establish a working democracy. Thus, this mitigating condition has partial application in this case.

Security concerns under this guideline also can be mitigated by showing "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 United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest." AG ¶ 8(b). Applicant spoke to his undivided loyalty to the United States. Based on his relationship and loyalty to the United States, he can be expected to resolve any conflict of interest in favor of the U.S. interest. He has lived in the United States since 1992, after fleeing Iraq, and did not return to Iraq until his mother's illness and his father's funeral. He owns property in the United States. He has worked in the United States for many years. He hopes to bring his siblings to the United States when he can support them financially. He has endured dangerous conditions in Iraq on behalf of the U.S. Army. There is no evidence that he has connections or contact with any people other than his brothers and sisters in Iraq. He has established application of AG 8(b).

Whole Person Concept

Under the whole person concept, an 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. An 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) the 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept.

The Appeal Board requires the whole person analysis address "evidence of an applicant's personal loyalties; the nature and extent of an applicant's family 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).

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Certain circumstances weigh against Applicant in the whole person analysis. First, there is a significant risk of terrorism in Iraq. More importantly for security purposes, terrorists are hostile to the U.S. and actively seek classified information. Terrorists, and even friendly governments, could attempt to use Applicant's sisters and brothers to obtain such information. Second, he was educated in Iraq and subsequently conscripted into Iraq's army. Third, his sisters and brothers remain citizens of Iraq. Fourth, he has some contact with his siblings.

Substantial mitigating evidence weighs in favor of granting Applicant a security clearance. Applicant fled Iraq and lived in refugee camps for two years. Applicant wanted to come to the United States. He is a mature person, who has lived in the United States since 1992, and has been a naturalized citizen for nine years. He has a strong sense of patriotism toward the United States, as witnessed by his dedication and work with the U.S. Army. There is no evidence that he has ever taken any action that could cause potential harm to the United States. His military supervisors, who work with him daily in a war zone, praised his work in the cause of freedom in Iraq. After fleeing Iraq in 1992, he never returned until his mother and father were gravely ill. He has established his life in the United States. He now owns property in the U.S.

Applicant held an interim security clearance during his tenure with the U.S. Army without indication that he breached security policies or procedures. He served the United States in a dangerous, high-risk situation and his character references establish his significant contributions to U.S. national security. While that fact is not normally to be considered a factor in granting a clearance, the Appeal Board noted in ISCR Case. No. 05-03846 at 6 (App. Bd. Nov. 14, 2006) as follows:

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 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 4 (App. Bd. Mr. 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 made a significant contribution to the nation's 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 to a foreign power's attempts at coercion or exploitation.

After weighing the disqualifying and mitigating conditions, and all facts and circumstances in the context of the whole person, I conclude Applicant has mitigated the security concerns pertaining to foreign influence.¹ Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance.

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25 of Enclosure 3:

Paragraph 1, Foreign Influence: FOR APPLICANT

¹

I conclude that the whole person analysis weighs heavily toward approval of his security clearance. Assuming a higher authority reviewing this decision determines the mitigating conditions articulated under AG 8 do not apply and severs any consideration of them, I conclude the whole person analysis standing alone is sufficient to support approval of a security clearance in this case.

Subparagraphs 1.a through 1.c: For Applicant

Conclusion

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

Noreen A. Lynch
Administrative Judge