



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 09-00010
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Francisco Mendez, Esq., Department Counsel
For Applicant: *Pro se*

June 17, 2010

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns under Guideline B (Foreign Influence) raised by Applicant's ties to Iraq. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on March 11, 2009. On July 27, 2009, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline B. DOHA acted 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 adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on August 28, 2009; answered it on October 26, 2009; and requested a hearing before an administrative judge. DOHA received the request on October 29, 2009. Department Counsel was ready to proceed on February 1, 2010, and the case was assigned to me on the following day. DOHA issued a notice of hearing on March 23, 2010, scheduling the hearing to be conducted by video teleconference on March 29, 2010. On March 25, 2010, the notice of hearing was amended to change the time of day for the videoconference. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A through E, which were admitted without objection. DOHA received the hearing transcript (Tr.) on April 6, 2010.

Notice of Hearing

Although Department Counsel and Applicant corresponded by email for several weeks before the hearing, the formal, written hearing notice was dated March 23, 2010, only six days before the hearing. Applicant affirmatively waived the 15-day written notice required by Directive ¶ E3.1.8. (Tr. 16-17.)

Administrative Notice

Department Counsel requested that I take administrative notice of relevant facts about Iraq. The request and the documents attached as enclosures were not admitted in evidence but are attached to the record as Hearing Exhibit (HX) I. I took administrative notice as requested by Department Counsel (Tr. 16.) The facts administratively noticed are set out below in my findings of fact.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.b-1.e and 1.h. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 51-year-old Iraqi linguist employed by a defense contractor. He has worked for his current employer since May 2008, and he has been supporting U.S. forces in Iraq since June 2009. He participated in the video teleconference from Iraq. (Tr. 41-42.) He has never held a security clearance.

Applicant was born in Iraq. He completed his mandatory military service in the Iraqi Army in 1987. He worked as a self-employed engineer, architect, and designer in Iraq from 1987 to 1991. He then worked for the Kurdish Relief Association, a non-governmental agency devoted to rebuilding the Kurdish regions of northern Iraq, from 1991 to 1996. He married an Iraqi citizen in September 1993. (GX 2 at 3.)

Applicant, his mother, his spouse, and his son were among the thousands of Iraqi Kurds who fled from Iraq and sought asylum in the United States. He and his

family fled Iraq and temporarily resided in Guam from December 1996 to March 1997, when the U.S. military brought them to the United States. (GX 2 at 3.)

Applicant's father, mother-in-law, and father-in-law are deceased. (GX 2 at 7.) His four brothers, a half-brother, and a half-sister are citizens and residents of Iraq. His oldest brother, a businessman involved in agricultural products, was a local party representative, but he is no longer involved in local politics. (Tr. 29.) They have telephonic contact every three or fourth months. (GX 2 at 6.) His second oldest brother is a dual citizen of Iraq and Austria and a self-employed farmer, and they have contact about twice a year. His third oldest brother is an Iraqi citizen, also working as a self-employed farmer, and they have telephonic contact every three or four months. His youngest brother is a sales representative for an air conditioning company, and they have contact every five or six months. Applicant's half-brother is a local government inspector, and they have contact about twice a year. His half-sister is a homemaker and not employed outside the home, and they have contact about once a year. His half-brother, half-sister, and all his brothers except the oldest reside in the semi-autonomous Kurdish regions in northern Iraq. (GX 2 at 5-7; AX A at 1.)

Applicant maintains contact with a high school friend who is now a self-employed building contractor. They lost contact in 1996, but since 2002 they have had contact every six or eight months. (GX 2 at 7-8.)

Applicant, his spouse, mother, and two children traveled to Iraq in October and November 2000 to attend the funeral of a half-brother and to visit his relatives. Applicant traveled by himself to Iraq in December 2004 and remained there until March 2005 to attend the funeral of his father-in-law and to visit his relatives and his high school friend. (GX 2 at 4, 7-8; AX A at 2.) Applicant's mother, spouse, and children traveled to Iraq in 2009 to visit his relatives. (Tr. 26-27.)

Applicant applied for U.S. citizenship in February 2005, and he became a U.S. citizen in April 2008. He renounced his Iraqi citizenship in June 2008. (GX 2 at 11.) His mother and son became U.S. citizens in April 2009, and his spouse became a U.S. citizen in May 2009. (GX 2 at 3; AX B, C, and D.)

Applicant and his family have lived in a rented home in the United States since 1997. They own no real estate or other assets in Iraq. (Tr. 28, 39.)

In 2004 and 2005, Applicant served as a board member for an Islamic civic association dedicated to help fellow Iraqi exiles. His organization taught classes, provided social services, and translated documents to help other Iraqi émigrés gain employment, register their children in school, and obtain other community services. (GX 1 at 15.)

In September 2007, Applicant assisted an Iraqi whom he had never met, by helping him find a place to live and become acquainted with the local Kurdish community in the United States. (GX 2 at 8; AX E.) He assisted the Iraqi in response to

a request from a U.S. Army colonel commanding the unit with whom the Iraqi served as a translator under combat conditions. The Iraqi was highly regarded by the unit commander. (AX E; Tr. 37.)

Applicant's site supervisor since his arrival in Iraq, a retired Air Force master sergeant, testified that Applicant is a "model linguist." He is very talented, intelligent, and conscientious. She recommended approval of Applicant's security clearance application without hesitation. (Tr. 45-46.)

I have taken administrative notice of the following facts about Iraq. In 2003, a coalition led by the United States removed Saddam Hussein and his Ba'athist regime from power. In March 2006, Iraq's new government took office after being freely elected by the Iraqi people. Despite recent improvements in security, Iraq remains dangerous, volatile, and unpredictable. Remnants of the former Ba'ath regime, transnational terrorists, criminal elements, and numerous insurgent groups remain active throughout Iraq. Terrorists armed and trained by Iran continue to endanger the security and stability of Iraq. Foreign terrorists from North Africa and other Middle Eastern countries continue to flow into Iraq, primarily through Syria. Al-Queda in Iraq possesses the means to launch high-profile attacks against Iraqi civilians and infrastructure. Travel in Iraq is dangerous. The security situation in the northern Kurdish areas of Iraq is relatively more stable than the rest of Iraq, but there are still incidents of violence in the northern areas.

I have also taken notice that the U.S. State Department has substantiated reports of human rights abuses in Iraq, including a climate of violence; misappropriation of authority by sectarian, criminal, and insurgent groups; arbitrary killings; torture; and other cruel, inhuman or degrading treatment or punishment. The Iraqi government's effectiveness in adhering to the rule of law is hampered by ongoing violence, corruption, sectarian bias, and lack of oversight and accountability. Treatment of detainees has been generally poor. The judiciary is weak, and judicial independence is impaired by threats and killings by insurgent, sectarian, tribal, and criminal elements. Security threats hinder access to the courts, and witness intimidation is common.

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 have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the 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 the applicant may deliberately or inadvertently fail to 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 made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the 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 the 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 an 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. 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's spouse, son, and mother are citizens of Iraq (¶ 1.a); his two brothers, half-brother, and half-sister are citizens are residents of Iraq (¶ 1.b); one of his brothers is a local political party official (¶ 1.c); another brother is a dual Iraqi-Austrian citizen residing in Iraq (¶ 1.d); and another brother is a dual Iraqi-German citizen residing in Iraq (¶ 1.e). It also alleges Applicant maintains contact with a friend in

Iraq (¶ 1.f), sponsored an Iraqi citizen whom he had never met for entry into the United States (¶ 1.g), and traveled to Iraq in 2000 and 2004 (¶ 1.h).

The security concern under this guideline 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.

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, “even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security.” ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. Nevertheless, 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, or the country is known to conduct intelligence operations against the United States. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. See *generally* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where administrative judge did not consider terrorist activity in area where family members resided).

Family ties with persons in a foreign country are not, as a matter of law, automatically disqualifying under Guideline B. Those family ties must be evaluated, however, to determine whether they put an applicant at risk of exploitation, pressure or coercion, or have the potential to put an applicant in the position of having to chose between the interests of family members and the interests of the United States. 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).

A disqualifying condition under this guideline 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). The “heightened risk” required to raise this disqualifying condition is a relatively low standard. “Heightened risk” denotes a risk greater than the normal risk inherent in having a family member living under a foreign government. 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).

Even though the United States and Iraq are allies, Applicant’s brothers, half-brother, half sister, and his high school friend are vulnerable to terrorists, insurgents, and criminal elements, making Applicant vulnerable to indirect pressure or coercion. The volatile, dangerous conditions in Iraq create the “heightened risk” contemplated by AG ¶ 7(a) and the potential conflict of interest contemplated by AG ¶ 7(b). Thus, these two disqualifying conditions are raised.

A security concern may be raised if an applicant is “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” AG ¶ 7(d). Applicant’s spouse, mother, and son are citizens and residents of the United States. They have no living family members in Iraq and no financial or political connections to Iraq. Thus, AG ¶ 7(d) is not raised. No other enumerated disqualifying conditions under this guideline are raised.

Applicant’s travel to Iraq in 2000 and 2004, and his family’s travel to Iraq in 2009 were to visit his family members in Iraq. As such, that travel has no independent security significance. See ISCR Case No. 02-26978 (App. Bd. Sep 21, 2005).

Since the Government produced substantial 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).

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 presence of Applicant’s family members in the volatile and dangerous conditions in Iraq precludes application of this mitigating condition.

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 U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest.” AG ¶ 8(b). Applicant has renounced his Iraqi citizenship. He, his spouse, his mother, and his son have become U.S. citizens. He put himself and his family at risk to resist oppression, lawlessness, and terrorism from 1991 to 1996. He came to the United States as a refugee, and he became heavily involved in assisting other Iraqi refugees. He has now left his spouse, mother, and son behind, and again placed himself in harm’s way to support the interests of the United States. His track record of selfless service demonstrates that he will recognize, resist, and report any attempts by a foreign power, terrorist organization, or insurgent group to coerce or exploit him. I conclude AG ¶ 8(b) is established.

Security concerns under this guideline also may be mitigated by showing that “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.” AG ¶ 8(c). There is a rebuttable presumption that contacts with an immediate family member in a foreign country are not casual. ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002). Although Applicant’s contacts with his family members in Iraq are infrequent, he has not rebutted the presumption that they are not casual. AG ¶ 8(c) is not established. No other enumerating mitigating conditions are established.

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 relevant 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 commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guideline B in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

