



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



In the matter of:

SSN: -----

Applicant for Security Clearance

)
)
)
)
)
)
)

ISCR Case No. 09-00164

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: *Pro se*

May 26, 2010

Decision

MALONE, Matthew E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and transcript, Applicant's request for a security clearance is denied.

On December 4, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for his defense contractor job as a translator. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) issued to Applicant two sets of interrogatories¹ to clarify or augment information about potentially disqualifying information in his background. After reviewing the results of the background investigation and Applicant's responses to the interrogatories, DOHA adjudicators were unable to make a preliminary affirmative finding² that it is clearly

¹ Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

² Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

consistent with the national interest to grant Applicant's request for access to classified information. On June 30, 2009, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which, if proven, raise security concerns addressed in the adjudicative guidelines (AG)³ for foreign influence (Guideline B) and personal conduct (Guideline E).

Applicant timely responded to the SOR and requested a hearing. The case was assigned to me on February 5, 2010. Pursuant to a Notice of Hearing issued the same day, I convened a hearing in this matter on February 23, 2010. The parties appeared as scheduled. The Government presented five exhibits (Gx. 1 - 5), which were admitted without objection. Applicant testified on his own behalf. DOHA received the transcript of hearing (Tr.) on March 3, 2010.

Department Counsel also asked in a pre-hearing submission, a copy of which was also sent to Applicant, that I take administrative notice of informational documents pertaining to Afghanistan and Pakistan. Those documents are included in the record as Jx. I (Afghanistan) and Jx. II (Pakistan). (Tr. 46 - 48) With one exception, which I addressed at the hearing my factual findings about those countries is based solely on information in those exhibits.

Findings of Fact

Under Guideline B, the Government alleged that Applicant's father (SOR 1.a), mother (SOR 1.b), brother (SOR 1.c), and sister (SOR 1.d) are citizens of and reside in Afghanistan. The Government further alleged that his father-in-law (SOR 1.e) and mother-in-law (SOR 1.f) are citizens of Afghanistan but reside in Pakistan. Also, the Government alleged that in about 2005, Applicant gave his cousin about \$1,200 to help pay for construction of a school in Afghanistan (SOR 1.g); that in about September 1989, he emigrated from Pakistan to the United States illegally using forged documents for which he paid about \$3,000 (SOR 1.h); that he served in the Afghan Army from about June 1988 to August 1988 (SOR 1.i); and that he traveled to Pakistan in 1998 and 2006 (SOR 1.j).

Under Guideline E, the Government alleged that Applicant deliberately tried to conceal from the Government the fact, as alleged at SOR 1.i, that he had served in the Afghan Army in 1988 when he answered "no" to e-QIP question 17.b (*Your Foreign Activities, b. Are you now or have you ever been employed by or acted as a consultant for a foreign government, firm, or agency?*) (SOR 2.a); and in a September 2, 2008, subject interview when he told an investigator that he had never served in the Afghan Army (SOR 2.b); and when he answered "no" to a question about foreign military service in the February 28, 2009, interrogatories from DOHA adjudicators (*1. Have you ever been employed by, served with, or been a member of any of the following: 1.c foreign military (including regular military, paramilitary, militia, or other group engaged in*

³ The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. Pending official revision of the Directive, they take precedence over the guidelines listed in Enclosure 2 to the Directive.

military operations) (SOR 2.c). Finally, through SOR 2.d, the Government cross-alleged as adverse personal conduct the facts recited in SOR 1.h.

In response to the SOR, Applicant admitted all of the SOR allegations. However, at the hearing, he amended his answer to deny the allegations that he ever served in the Afghan Army. Accordingly, he has denied the allegations at SOR 1.i, and 2.a - 2.c. (Tr. 14 - 25) Having reviewed Applicant's response to the SOR, the transcript, and exhibits, I make the following findings of relevant fact.

Applicant is 46 years old and is employed as a translator with the U.S. military in Afghanistan, his native country. Applicant was born and raised in or near Kabul, the Afghan capital city. His parents live⁴ in Kabul, the capital of Afghanistan, and his brother and sister live in a rural area west of Kabul. He speaks with them about twice a year, but has not seen either of them in several years. Applicant's wife was also born and raised Afghanistan. They have been married since June 1998 and they have two children, ages seven and five, both of whom were born in the United States. Applicant was naturalized as a U.S. citizen in February 1998. His wife received her U.S. citizenship in July 2008. (Gx. 1; Gx. 3)

Applicant's father-in-law and mother-in-law are both citizens of Afghanistan, but they reside in a city in western Pakistan near the border with Afghanistan. Applicant believes his father-in-law served in the Afghan army several years ago as required of all Afghan males of a certain age. Applicant's brother-in-law and sister-in-law are Afghan citizens, but they live and work in Canada. Applicant has had little or no contact with them. When Applicant is in the United States, he has had little contact with his relatives in Afghanistan because telephone service is poor. However, he is able to contact his parents and siblings more easily when he is in Afghanistan working for the Army. He is not allowed to visit them unless he is on leave from his job. (Gx. 3; Tr. 79 - 80, 86)

As required for his work as a translator, Applicant has traveled overseas to Afghanistan, Pakistan, the United Arab Emirates, and Kyrgyzstan. However, he also traveled to Pakistan in 1998 to marry his wife, and in 2006 with his wife and children to visit her family. (Gx. 1; Gx. 3) Applicant used his U.S. passport for all of his foreign travel. (Gx. 4)

Afghanistan has been an independent nation ruled by indigenous monarchs since 1919, when the British Empire relinquished control. However, in 1979, the Soviet Union invaded Afghanistan and occupied the country until 1989. Thereafter, a civil war ended when the Taliban took control of the government and established a regime based on an extreme fundamentalist version of Islamic law. Human rights were virtually non-existent, especially for women, and dissent was countered through violent repression. The Taliban regime also created circumstances that allowed Osama bin Laden and al-Qaida safe haven and resources for international terrorist actions that culminated in the attacks on the U.S. on September 11, 2001.

⁴ The summary of his subject interview (Gx. 3) with an investigator on September 2, 2008, stated that his parents are deceased. Applicant corrected this at the hearing. (Tr. 31, 79 - 80)

The subsequent U.S. military actions against the Taliban allowed the establishment of an openly-elected government based on a western democratic model. However, the country remains unstable and human rights abuses continue at the hands of the Taliban in areas they still control. The Afghan government continues to struggle in its efforts to overcome a legacy of corruption, and U.S.-led coalition forces have been unable to provide a secure environment either in the countryside or in Afghanistan's urban centers. U.S. personnel are at constant risk of attack, kidnapping, and other hostile acts by insurgents.

Pakistan is characterized as a "parliamentary federal republic." Most of its western border abuts Afghanistan. Pakistan's western topography along with regional political alliances within the western and northwestern areas of Pakistan have kept the Pakistani government and its military from securing the border against Taliban, al-Qaida, and other insurgent activities against U.S. and coalition forces in Afghanistan. After the 9-11 attacks, Pakistan joined the U.S. in the Global War on Terror; however, more recently, Pakistan has allowed Taliban factions to establish local governments along the Afghan border based on strict Islamic law. Taliban influence also has extended to urban areas in western Pakistan, resulting in increased safe havens for insurgents attacking U.S. troops in Afghanistan and as a base of operations for international terrorist organizations. Pakistan's human rights record has been poor of late, largely as a result of the exercise of broad, unchecked police powers in the name of anti-terror and anti-insurgency measures.

Applicant left Afghanistan in 1988 because of the Soviet occupation there. He lived as a refugee in Pakistan until July 1989, when he paid someone \$3,000⁵ for forged documents used to enter the U.S. illegally. (Gx. 3; Tr. 60 - 63) The money paid was also for that person to travel to the U.S. with Applicant. On arrival at an international airport in the U.S., the person abandoned Applicant. When Applicant came to the attention of authorities at the airport, he was detained for several months, but was provided legal aid services and was eventually able to obtain his green card. (Gx. 3)

On several occasions since about October 2005, Applicant has worked for defense contractors as a "role player" to support training of U.S. military personnel being deployed to Iraq and Afghanistan. In June 2007, he began working as a translator for a defense contractor supporting U.S. Army personnel in Afghanistan. He was given an interim clearance, which was never finalized (ostensibly because his contract ended).

In December 2008, when he was hired for his current translator position with a defense contractor for the Army, he submitted his e-QIP for his security clearance. He was also interviewed by Army personnel as part of an overseas screening process. Applicant was asked numerous questions about his background in addition to the questions in the e-QIP. In response to question 19 of the overseas screening questionnaire, Applicant stated that he had served in the Afghan Army from June 1988 until August 1988, but deserted because the Army was run by the occupying Soviet

⁵ A cousin gave him the money. (Tr. 108)

forces. Applicant did not want to serve the Soviets, and he was sure he would be killed by the Afghan rebels who were fighting the Soviets. (Gx. 3, Screening Questionnaire, Questions 19 and 52) Applicant did not disclose his Afghan military service in response to e-QIP question 17, the only e-QIP question that contemplates employment by, or other official interaction with or on behalf of a foreign government. (Gx. 1) When he was interviewed during his background investigation, Applicant denied to the investigating agent that he had ever served in the Afghan army. (Gx. 3) In response to DOHA interrogatories, which specifically asked about service or membership in a foreign military organization (Gx. 2, Question 1.c), Applicant denied ever having served in the Afghan Army.

Finally, at the hearing Applicant repeatedly denied having served in the Afghan army. (Tr. 63, 93 - 96) He testified that he remembered the occasion when the overseas screening document was completed, and he denied making the statement in response. Aside from insisting that the screening questionnaire was generally inaccurate, he could not explain why the interviewer would include the specific remarks about his alleged service and desertion. (Tr. 70 - 71, 113 - 114)

Applicant still has contact with members of his extended family in Afghanistan. Sometime in 2005, Applicant sent a cousin \$1,200 to help finance the construction of a school in a rural area west of Kabul. Applicant and the cousin were questioned about this by U.S. government officials because the cousin had transferred more than \$10,000 to Afghanistan in connection with the school construction effort. (Gx. 3)

Policies

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁶ for an applicant to either receive or continue to have access to classified information. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁷ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole-person” concept, those factors are:

- (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.

⁶ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁷ Directive. 6.3.

The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under AG ¶ 6 (Foreign Influence - Guideline B) and AG ¶ 15 (Personal Conduct - Guideline E).

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁸ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.⁹

Analysis

Foreign Influence.

The Government presented sufficient information to support the factual allegations in SOR ¶ 1. Those allegations, all of which Applicant admits, except for SOR 1.i, raise security concerns about Applicant's personal relationships and other interests in Afghanistan and Pakistan. Specifically, as stated in AG ¶ 6,

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.

At the outset, the Government's information about Applicant's illegal entry 22 years ago into the United States is not disqualifying under this guideline. His conduct in

⁸ See *Egan*, 484 U.S. at 528, 531.

⁹ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

this regard does not indicate he was unduly influenced by his interests in either Afghanistan or Pakistan. He was trying to escape Soviet aggression in his native land and trying to create a better life for himself than would have been possible as a refugee in Pakistan. SOR 1.h is resolved for the Applicant. The Government's information also supported the allegation (SOR 1.i) that Applicant served in the Afghan army in 1988. However, it is also clear that the Afghan army was likely a Soviet-run organization made up of unwilling conscripts who were forced to fight against their countrymen fighting for an insurgency the U.S. was supporting at the time. A brief, involuntary participation in such an organization more than 22 years ago does not require application of any of the disqualifying conditions under this guideline.

As to the remaining allegations, the facts established through the Government's information in support of SOR 1.a - 1.f require application of the disqualifying conditions at AG ¶ 7(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*). By definition, Applicant is close to his immediate family (his parents and two siblings living in Afghanistan). There is also a rebuttable presumption that, by virtue of his relationship with his wife, that he is closely tied to her parents, who are citizens of Afghanistan but reside in Pakistan near the border with Afghanistan. The facts established through SOR 1.j are not in and of themselves disqualifying. But Applicant's travel back to Pakistan to get married in 1998, and in 2006 with his wife and children to visit his wife's family is indicative of his close ties to persons in Pakistan.

Also indicative of his ties to persons in Afghanistan is his donation of money to his cousin to help build a school there. (SOR 1.g) This, of course, is a worthy endeavor, but the security significance of such ties to foreign national family and associates must be taken into account. Further, in light of available information about the instability of both the Afghan and Pakistani governments, and the widespread anti-U.S. violence and international terrorism concerns in that region, the presence of Applicant's close ties of affection in both countries creates a heightened risk of exploitation.

Available information does not support any of the other disqualifying conditions under AG ¶ 7. By contrast, the Applicant has not presented any information that would support application of any of the mitigating conditions listed under AG ¶ 8. The mitigating condition at 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) does not apply because, although his contact with family overseas is infrequent, his ties are close and contact with them increases when he is actually working in Afghanistan. The Government presented sufficient information to support the factual allegations in the SOR, thereby shifting the burden of persuasion to the Applicant to mitigate, extenuate, or refute the allegations. Because he failed to do so, the security concerns about possible foreign influence remain.

Personal Conduct

In SOR 2.d, the Government cross-referenced the allegation in SOR 1.h as a security concern under Guideline E. For the same reasons his conduct was mitigated

under Guideline B, it likewise is mitigated under this guideline. SOR 2.d is resolved for the Applicant.

As to the allegations that Applicant knowingly and wilfully made false statements to the Government when he omitted foreign military service from his e-QIP (SOR 2.a), during an interview with a Government investigator (SOR 2.b), and in response to DOHA interrogatories (SOR 2.c), the Government has met its burden of producing sufficient reliable information to support those allegations. While the language in e-QIP question 17 does not specifically refer to military service, his repeated unexplained omissions of that information tends to show that he intended, for whatever reason, to conceal his Afghan military service. All of the information presented raises a security concern that is expressed at AG ¶ 15 as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

More specifically, available information supports application of the disqualifying conditions listed at AG ¶ 16(a) (*deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*) and AG ¶ 16b) (*deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative*). By contrast, he did not provide any information that would support any of the mitigating conditions listed at AG ¶ 17. On balance, he has failed to mitigate the security concerns raised by his responses to Government questions about relevant information in his background.

Whole-Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines B and E. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Available information shows that Applicant, 46 years old, is a mature, responsible father and husband. He has a record of steady, reliable employment, but he provided no favorable personal or professional information that outweighs the adverse information about his foreign ties of affection or his alleged lack of candor during his background investigation. A fair and commonsense assessment¹⁰ of all available information bearing on Applicant's past and current circumstances shows he has not addressed satisfactorily the Government's doubts about his ability and willingness to protect the Government's interests as his

¹⁰ See footnote 7, *supra*.

own. Because protection of the national interest is paramount in these determinations, such doubts must be resolved for the government.¹¹

Formal Findings

Formal findings 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:	AGAINST APPLICANT
Subparagraphs 1.a - 1.g:	Against Applicant
Subparagraphs 1.h - 1.i:	For Applicant
Subparagraph 1.j:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a - 2.c:	Against Applicant
Subparagraph 2.d:	For Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest to continue Applicant's access to classified information. Request for security clearance is denied.

MATTHEW E. MALONE
Administrative Judge

¹¹ See footnote 9, *supra*.