



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



In the matter of:)
)
-----) ISCR Case No. 09-03844
)
Applicant for Security Clearance)

Appearances

For Government: James F. Duffy, Esq., Department Counsel
For Applicant: Robert L. Morris, Esq.

April 11, 2011

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for an industrial security clearance. This case is based on foreign influence security concerns raised by Applicant’s ties or connections to Afghanistan (his country of birth) and Pakistan. He has lived in the United States since age 20, and he has been a U.S. citizen for about 25 years. He has four children, all of whom are native-born U.S. citizens. He has no foreign financial interests of any kind. His family ties to Afghanistan and Pakistan, via his siblings and mother, are not strong due to geographic separation and a lack of interaction for many years. The evidence also shows he has a depth of loyalty to the United States, so that he can be expected to resolve any conflict in favor of the U.S. interest. He demonstrated his commitment by working as a linguist supporting the U.S. armed forces in combat zones where he served in harm’s way exposed to considerable danger. Accordingly, as explained below, this case is decided for Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on June 29, 2010, the Defense Office of Hearings and Appeals (the Agency) issued a statement of reasons (SOR) explaining it was unable to find that it was clearly consistent with the national interest to grant Applicant access to classified information. The SOR is equivalent to a complaint, and it detailed the factual basis for the action under the security guideline known as Guideline B for foreign influence. The SOR also recommended submitting the case to an administrative judge for a determination to deny or revoke Applicant's eligibility for a security clearance.

Applicant timely answered the SOR and requested a hearing. The case was assigned to me October 7, 2010. The hearing took place pursuant to written notice on November 17, 2010. The hearing transcript (Tr.) was received November 29, 2010.

Procedural Matters

I took administrative or official notice of certain facts concerning the countries of Afghanistan and Pakistan as set forth in Department Counsel's written requests.² Suffice it to say, the problematic conditions in Afghanistan and Pakistan are well known within the Defense Department and need not be repeated herein.

Findings of Fact

In general, the SOR alleges that Applicant is unsuitable for a security clearance under Guideline B for foreign influence based on his family ties or connections to Afghanistan and Pakistan. In his Answer to the SOR, Applicant admits the specific factual allegations. In addition, the following facts are established by substantial evidence.

Applicant is a 54-year-old native of Afghanistan and a naturalized U.S. citizen. He is seeking a security clearance for his employment as a linguist and cultural advisor. He has worked for his current employer, a federal contractor, since about October 2007. He has worked in direct support of the U.S. armed forces in combat zones where he served in harm's way exposed to considerable danger. He presented documentary evidence establishing his trustworthiness, reliability, and good employment record while

¹ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended, and DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

² Exhibits 4 and 5.

working under difficult conditions.³ Much of that documentary evidence consists of highly favorable letters of recommendation from U.S. military officers who relied on Applicant to perform sensitive and important work in support of the U.S. mission. Most impressive was a letter from the commanding general, a U.S. Army brigadier general, of a special operations command in Afghanistan.⁴ The brigadier described Applicant as a “superb asset” to the command and assessed Applicant as a trustworthy and reliable person. This is the first time Applicant has applied for a security clearance, completing an application in October 2007.⁵

Applicant married a U.S. citizen in 1979, and they divorced in 1995. He has four children, ranging in age from 32 to 9, all of whom are native-born U.S. citizens. One is an accountant, another is an attorney, the third is a college student, and the nine-year-old child is attending public school.

Applicant was born and raised in Afghanistan. He left the country at the age of 20 and immigrated to the United States to pursue his education in the field of engineering. He entered the United States on a student visa, and he was awarded a bachelor’s degree in electrical engineering in 1984. He obtained U.S. citizenship in 1985. Except for his recent employment outside the country, he has lived in the same city and state in the United States since at least 1989.⁶

Applicant has had a varied employment history in the United States. For example, following his graduation from college in 1984, he was hired by a large telecommunications company. He was in the process of completing a training program there when he left in about December 1984 to care for his father. His father was living in India in light of the Soviet Union’s invasion and occupation of Afghanistan. Applicant returned to the United States after a few months and was unable to return to his previous job. He then accepted employment with a construction company. More recently, he worked as a taxi driver and mechanic from 1993 to early 2007.

Applicant comes from a large family, many of whom do not live in the United States. Two of his brothers are now deceased, and two brothers live and work in the United States. His father is now deceased, and his mother is living in Pakistan. He does not provide financial support to any of his siblings or mother. As a rule, Applicant did not contact any of these family members when working outside the United States. Addressing the specific factual allegations in SOR ¶¶ 1.a through 1.e, the evidence establishes the following:

³ Exhibits A–J.

⁴ Exhibit B.

⁵ Exhibit 1.

⁶ Exhibit 1.

1. Applicant's mother is a citizen of Afghanistan and she lives in Pakistan. She is a retired homemaker, and she does not have ties to any foreign government or military. Applicant last saw her in 2005, and he has telephonic contact with her one to two times per month. His mother supports herself on rental income generated from a real-estate holding.
2. Applicant has one brother and four sisters who are citizens of Afghanistan and live in Pakistan. The brother is currently unemployed and the four sisters do not work outside the home. They do not have ties to any foreign government or military.
3. Applicant has one brother and one sister who are citizens and residents of Afghanistan. The brother is unemployed and the sister does not work outside the home. They do not have ties to any foreign government or military.
4. Applicant has one brother who is a U.S. citizen and is currently living in Pakistan. He is a property manager. He does not have ties to any foreign government or military.
5. Applicant has traveled to both Afghanistan and Pakistan to see family. His last trip was in 2005 to see his mother.

Other than his mother, Applicant has limited, one to two times annually, telephonic contact with his siblings living in Afghanistan and Pakistan. His relationships with these siblings has grown distant over time based on geographic separation and lack of contact.

Law and Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. The only purpose of a clearance decision is to decide if an applicant is suitable for access to classified information. The Department of Defense takes the handling and safeguarding of classified information seriously because it affects our national security, the lives of our servicemembers, and our operations abroad.

It is well-established law that no one has a right to a security clearance.⁷ As noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁸ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

⁷ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

⁸ 484 U.S. at 531.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.⁹ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁰

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹¹ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹² An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹³ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁴ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹⁵ The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹⁶

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant facts and circumstances, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.¹⁷ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

⁹ Directive, ¶ 3.2.

¹⁰ Directive, ¶ 3.2.

¹¹ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹² Directive, Enclosure 3, ¶ E3.1.14.

¹³ Directive, Enclosure 3, ¶ E3.1.15.

¹⁴ Directive, Enclosure 3, ¶ E3.1.15.

¹⁵ *Egan*, 484 U.S. at 531.

¹⁶ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹⁷ Executive Order 10865, § 7.

Analysis

Under Guideline B for foreign influence,¹⁸ the suitability of an applicant may be questioned or put into doubt due to an applicant's foreign connections and interests. The overall concern under the guideline is:

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.¹⁹

Of the several disqualifying conditions under the guideline, there are two that could raise security concerns and may be disqualifying in this case:

¶ 7(a) contact with a foreign family member, business, or professional associate, friend, or other person who is a citizen of or a resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion; and

¶ 7(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.

These disqualifying conditions apply due to Applicant's family ties or connections.

There are six mitigating conditions under the guideline. Any of the following may mitigate foreign influence security concerns:

¶ 8(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the United States;

¹⁸ AG ¶¶ 6, 7, and 8 (setting forth the security concern and the disqualifying and mitigating conditions).

¹⁹ AG ¶ 6.

¶ 8(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 United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;

¶ 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;

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

¶ 8(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; or

¶ 8(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.

The most pertinent here is the second mitigating condition, ¶ 8(b). It applies for two reasons. First, Applicant's sense of loyalty or obligation to his family members in Afghanistan and Pakistan is *pro forma* or minimal. His family ties to Afghanistan and Pakistan, via his siblings and mother, are not strong due to geographic separation and a lack of interaction for many years. Second, based on his service as a linguist working on behalf of the U.S. armed forces, as well as his strong family ties, via his children, to the United States, I conclude that his significant relationships and loyalties in the United States are deep and longstanding and will remain so. As such, he can be expected to resolve any potential conflict of interest in favor of the U.S. interest.

This is not a case of "divided loyalties"²⁰ with an applicant who has one foot in the United States and one foot in his native country. On the contrary, the evidence shows Applicant has both feet in the United States and that he has substantial contacts and ties to the United States. Furthermore, his work as a linguist on behalf of the U.S. armed forces is persuasive evidence of his commitment to the United States. This circumstance does not dictate the outcome of the case, but it does receive favorable consideration under the whole-person concept.²¹ Taken together, the totality of facts and circumstances support a conclusion that Applicant can be expected to resolve any potential foreign influence or pressure by either coercive or non-coercive means in favor of the U.S. interest.

²⁰ AG ¶ 6.

²¹ AG ¶ 2(a)(1)-(9).

To conclude, based on the evidence as a whole, both favorable and unfavorable, Applicant presented sufficient evidence to explain, extenuate, or mitigate the foreign influence security concerns. Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided for Applicant.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline B: For Applicant

Subparagraphs 1.a–1.e: For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Michael H. Leonard
Administrative Judge