



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-04769
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esquire, Department Counsel
For Applicant: -----, Personal Representative

March 25, 2011

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

On May 19, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing 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 (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

In an August 30, 2010, response to the SOR, Applicant admitted the three allegations raised under Guideline B and requested a decision without a hearing. DOHA elected to have a hearing on the matter. The case was assigned to me on November 8, 2010. Department Counsel and Applicant agreed to a December 9, 2010, hearing date. A Notice of Hearing was issued by DOHA on November 16, 2010, setting the hearing for that date.

The hearing took place as scheduled. Department Counsel submitted four exhibits (Ex.) which were accepted into the record as Exs. 1-4 without objection. I also accepted Department Counsel’s memorandum requesting administrative notice of certain facts related to the Islamic Republic of Afghanistan (Afghanistan). It was

accepted without objection as Hearing Exhibit 1 (HE-1). Aided by his daughter, Applicant gave testimony and introduced one witness. The transcript (Tr.) was received on December 14, 2010, and the record was closed. Based upon a review of the exhibits and testimony, security clearance is denied.

Administrative Notice

At the hearing, the Government requested I take administrative notice of certain facts relating Afghanistan. The facts are summarized at pages 1 through 6 of the request, and supported by seven documents pertaining to Afghanistan (HE-1). The documents are included to provide elaboration and context for the summary. I take administrative notice of the facts included in the U.S. Government reports in HE-1. They are limited to matters of general knowledge, not subject to reasonable dispute. They are set out below and adopted as factual findings.

Afghanistan is a country in Southwestern Asia. It is approximately the size of Texas (249,935 square miles). Pakistan borders it on the east and the south. Iran borders it on the west and Russia to the north. It is a rugged and mountainous country which has been fought over by powerful nations for centuries. In 2006, the population was about 31 million people with about three million Afghans living outside Afghanistan.

Afghanistan is presently an Islamic Republic with a democratically elected president. Afghanistan has had a turbulent political history, including an invasion by the Soviet Union in 1979. After an accord was reached in 1989, and the Soviet Union withdrew from the country, fighting continued among the various ethnic, clan and religious militias. By the end of 1998, the Taliban rose to power and controlled 90% of the country, imposing aggressive and repressive policies.

In October 2001, U.S. forces and coalition partners led military operations in the country, forcing the Taliban out of power by November 2001. The new democratic government took power in 2004 after a popular election. Despite that election, terrorists including al-Qaida and the Taliban continue to assert power and intimidation within the country. Safety and security are key issues because these terrorist organizations target United States and Afghan interests by suicide operations, bombings, assassinations, car-jacking, assaults, or hostage taking. At this time, the risk of terrorist activities remains extremely high. The country's human rights record remains poor and violence is rampant. According to recent reports from the U.S. Department of State, insurgents continue to plan attacks and kidnappings of Americans and other Western nationals. Travel warnings are ongoing. No section of Afghanistan is immune or safe from violence.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegations at issue (SOR allegations ¶¶ 1.a-1.g). Specifically, he admitted that he was a military officer in the Afghanistan military for a specified period (¶ 1.a); has a half-brother with two sons who are all citizens and residents of Afghanistan (¶ 1.b); and that he resided in

Afghanistan with family members from about June 2003 until approximately October 2004 (¶1.c). His admissions are incorporated herein.

As a preliminary matter, Applicant admits SOR allegation ¶ 1.b, but both the admission and the allegation are imprecisely phrased. The half-brother referenced is the son of Applicant's father's cousin and that cousin's wife.¹ The cousin's widow later married Applicant's father.² Consequently, the half-brother referenced appears to be Applicant's step-brother. Applicant's step-brother's two sons, therefore, would be more accurately be termed Applicant's cousins. However, for the sake of consistency, they are called half-brother and nephews below.

Applicant is 66-year-old potential employee of a defense contractor. He was abandoned as a child and educated in military school. He completed three years of college. Applicant served in the Afghanistan military, where he ultimately became an officer. He served in the military from about 1960 until he fled with his wife and children to Pakistan as refugees in the early 1980s.³ They left their possessions in their former home. In Pakistan, he worked for a political group. He came to the United States in 1983 and became a U.S. citizen in 1992.

After two decades in the United States, Applicant decided to visit Afghanistan in about December 2003.⁴ He had no plans to visit with specific individuals, he only wanted to go for a month for "pleasure" and to see his old home, which he assumed would still be vacant.⁵ He was met at the airport by his son-in-law's brother, who was available to help him around town. When he returned to his home, he discovered that various family members were now living there. After discovering his family had taken over his house, he decided to stay longer to investigate the current status of the house and its ownership. While there, he kept to himself in his room.⁶ He occasionally walked around the town and visited with the brother of his son-in-law, but otherwise he did not visit any old contacts. He did not speak with his half-brother, who is about 20 years his

¹ Tr. 55; Ex. 2 (Interrogatories), Interview of Dec. 24, 2008, at 4.

² *Id.*

³ Applicant has trouble with dates, possibly due to the use of the Gregorian calendar in the United States. See, e.g., Tr. 33-37, 85-86, 103-104. In addition, the term "approximately" was explained to him in his native language by his children. Tr. 39. During his cross-examination, it appeared that Applicant had some English language difficulties. See, e.g., Tr. 39, 43-44, 46, 47-48, 49, 53, 61-63, 69, 76-78, 80-82, 84, 95. He has also had a recent heart attack that "maybe blocks his thinking and makes him more nervous." Tr. 50. As an accommodation, his personal representative was permitted to provide occasional translation duties.

⁴ Tr. 68-69. In contrast, the SOR allegations stated that he arrived in June 2003.

⁵ Tr. 69-73, 83.

⁶ Tr. 87.

elder and with whom he disputed ownership over the Applicant's former residence.⁷ He did, however, interact with his half-brother's two adult sons. Applicant remained in the house until after he lost his claim for ownership.⁸ He then left Afghanistan in about October 2004. There is no information as to whether Applicant and his half-brother have reconciled over their disagreement.

Applicant later returned for a month in 2007 to have dental work performed.⁹ During that visit, he stayed with his son-in-law's brother. He did not visit with his own family or return to his old house.¹⁰

Applicant's two nephews own their own businesses, a grocery store and a business concerned with medicine, respectively.¹¹ Applicant does not know if any of these men have ties to the government or whether they served in the military.¹² No evidence was introduced regarding these men's spouses or families, if any. No significant information about his son-in-law's brother was provided, except that he often visits the United States and their families interact. Applicant's immediate family is in the United States, where they are residents and citizens.

In previous statements, Applicant stated that he had allegiance to Afghanistan.¹³ Applicant does not remember making such a statement.¹⁴ At the hearing, he testified that his allegiance is to the United States.¹⁵ In earlier statements, Applicant stated he personally knew or had close relationships with high-ranking Afghani officials, but

⁷ Tr. 89, 93-94.

⁸ Tr. 96, 99.

⁹ Tr. 66-67. The SOR does not note this visit in the allegations. Applicant previously provided information that he was in Afghanistan from July 2007 until about November 2007. Tr. 103-104.

¹⁰ *But see*, Tr. 98-99. Elsewhere, Applicant has stated that he had contact with his nephews. *See, e.g.*, Ex. 2 (Interrogatories) Interview of Dec. 24, 2008, at 7.

¹¹ Tr. 108.

¹² Tr. 108-109. Applicant's representative noted, "He doesn't have the right vocabulary, just to say, 'Not to my knowledge.' He's saying 'No,' but it's just 'not to my knowledge'" Tr. 109.

¹³ Tr. 109-112.

¹⁴ Tr. 110.

¹⁵ Tr. 111.

denied such associations at hearing.¹⁶ Applicant hopes to become an interpreter so that he can provide service and go back to Afghanistan.¹⁷

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are required in evaluating an applicant's eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." All available, reliable information about the person, past and present, favorable and unfavorable, must be and were considered in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching my decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence submitted.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." ¹⁸ The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.¹⁹

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. 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

¹⁶ See, e.g., Tr. 26-28, 43-44, 112-114.

¹⁷ Tr. 19, 115, 125.

¹⁸ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

¹⁹ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”²⁰ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.²¹ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.²² It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of the evidence, I find Guideline B (Foreign Influence) to be the most pertinent to the case. Conditions pertaining to this AG that could raise a security concern and may be disqualifying, as well as those which would mitigate such concerns, are discussed below.

Analysis

Guideline B – Foreign Influence

The concern under Guideline B is that 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. Consideration should be given to 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 U.S. citizens to obtain protected information or is associated with a risk of terrorism. Conditions pertaining to this adjudicative guideline that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, are discussed in the conclusions below.

The country at issue is Afghanistan. Both the Taliban and Al-Qaida have an active presence in the country. The threat of terrorism and violence is pervasive.

²⁰ *Id.*

²¹ *Id.*

²² Executive Order 10865 § 7.

Consequently, given heightened security risks, close scrutiny is warranted in my assessment below.

The SOR notes Applicant's foreign contacts as his half-brother and two nephews, residents and citizens of Afghanistan. In addition, Applicant served in the Afghani military as an officer, where he apparently knew high-ranking officials. Such facts are sufficient to give rise to Foreign Influence Disqualifying Conditions 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 exploitation, inducement, manipulation, pressure, or coercion) and AG ¶ 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). With disqualifying conditions thus raised, the burden shifts to Applicant to mitigate security concerns.

There is insufficient evidence to gauge Applicant's current relationship with his half-brother. Whether their relationship was irretrievably broken by the dispute over home ownership or not is unclear. It is clear that Applicant maintained at least a cordial relationship with his nephews, who, before Applicant's visit to Afghanistan in 2004-2005, he would not have seen since their childhood. While there is no evidence that any of these relations are people with whom Applicant maintains exceptionally close ties, insufficient information was provided about them to assess them as foreign contacts, gauge their standing in their Afghani community, or explore any ties they might have with governmental, political, or even terrorist organizations. What is clear, however, is that they remain ill-defined relatives who are residents and citizens of Afghanistan. Foreign Influence Mitigating Conditions AG ¶ 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 U.S.) and 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) do not apply.

Applicant's sense of loyalty, if any, to these Afghani kin cannot be properly assessed given the deficient evidence provided. Moreover, perhaps due to English language difficulty, there is a conflict of evidence regarding Applicant's loyalty to or sentiments for Afghanistan, despite his expressed loyalty to the United States. Related concerns are sustained by the facts he visited Afghanistan in 2003 through 2004, sued to retain ownership of a home that he abandoned decades ago, returned to Afghanistan for dental care in 2007, and now seeks to become a translator in that country. In addition, scant evidence was provided about Applicant's domestic relationships, interests, and feelings. In short, Applicant failed to provide clear and unequivocal evidence that would sufficiently dispel lingering questions about his loyalties and raise

AG ¶ 8(b) (there is no conflict of interest, either because the individual's sense of loyalty to 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).

Applicant addressed the allegations that he admitted. However, he did not supplement his admissions with sufficient information, despite relevant questions from Department Counsel and his personal representative. Moreover, certain aspects of his testimony were at odds with previous statements that he made, and insufficient information was provided to reconcile such conflicts. As a result, lingering questions remain regarding the foreign influence security concerns raised.

Whole-Person Concept

Under the whole-person concept, the 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. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the "whole-person" factors. Applicant is a mature man who is educated and who provided many years of foreign military service. He raised a family in the United States. Applicant desires to become a translator and, if possible, serve in his former homeland.

As noted above and in the transcript, Applicant demonstrated an increasingly poor understanding of the common vernacular as the hearing progressed, although his general delivery of English clearly demonstrated his knowledge of the language. As a result, much of his testimony was unelaborated or, at times, seemed to be in conflict. Consequently, much was discussed, but, in terms of the allegations, little was learned about Applicant or his extended family.

Because so little is known about Applicant's half-brother, nephews, and in-law, neither their relationships nor their significance as potential sources of foreign influence can be assessed under the standards set forth in the AG. Moreover, conflicts between Applicant's testimony and his prior statements leave lingering questions as to his life, loyalties, and activities. The ultimate burden of persuasion is put squarely on the Applicant in these cases. Any doubt concerning personnel being considered for access to classified information will be resolved in favor of national security. Given the record as a whole, I find that Applicant failed in his burden. Clearance is denied.

