



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-06726
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

November 22, 2010

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on May 11, 2009. On April 13, 2010, 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 April 26, 2010; answered it on May 13, 2010; and requested a determination on the record without a hearing. DOHA received the request

on April 29, 2010. On June 8, 2010, Department Counsel requested a hearing before an administrative judge. (Hearing Exhibit (HX) I.) Department Counsel was ready to proceed on June 30, 2010, and the case was assigned to me on July 7, 2010. DOHA issued a notice of hearing on July 21, 2010, scheduling it for September 1, 2010. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified, but he presented no documentary evidence or witnesses. DOHA received the transcript (Tr.) on September 10, 2010.

Administrative Notice

Department Counsel requested that I take administrative notice of relevant facts about Pakistan. The request and supporting documents are attached to the record as HX II. I took administrative notice as requested by Department Counsel. (Tr. 22.) At my direction, Department Counsel also presented documents to support administrative notice of the relevant facts about Afghanistan. (Tr. 59; HX III.) 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.a, 1.b, and 1.c, but he denied the allegations in SOR ¶¶ 1.d and 1.e. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 52-year-old linguist employed by a defense contractor since May 2009. He has an interim security clearance. He was born in Afghanistan, where he completed college in January 1981 at government expense. He initially avoided military service in Afghanistan by working for the United Nations. (GX 4 at 4.) He fled to Pakistan in 1990 to avoid military service, after the age limit for conscription was raised. He left Pakistan and came to the United States in May 1998, looking for better pay, better schools for his children, and better health care. (Tr. 55-56). He became a U.S. citizen in March 2006. (GX 3 at 13; GX 4 at 1-2, 9.)

Applicant testified that he wants to work as a linguist to help himself, help the United States Government, and help the Afghan people. (Tr. 48.) In his counter-intelligence screening questionnaire, he stated that he is applying for the linguist position to help the people of Afghanistan and because of the financial compensation. (GX 4 at 9.) He has not yet performed any services as a linguist because he does not have a clearance. (Tr. 33.)

Applicant has worked as a “rental technician” for a medical supply rental agency since November 2004. He worked as a landscaper from August 2001 to November 2004. (GX 1 at 16-19.) He spends his free time at home and is not involved in any community activities. (Tr. 47.) He did not present any performance evaluations or letters of recommendation from current or former employers.

Applicant married a citizen of Afghanistan in 1988, and they have four children who were born in Afghanistan but are now U.S. citizens. His spouse became a U.S. citizen in April or May 2006 (Tr.27.). She works as a tailor. (Tr. 31; GX 4 at 4.) She and two of their children went to Pakistan two years ago to visit family members. She talks to her family members every two or three days by telephone. (Tr. 53.)

Applicant's parents and father-in-law are deceased. His two brothers are citizens of Afghanistan. The older brother lives in Afghanistan and the younger lives in Pakistan. Applicant has not had any contact with his older brother in Afghanistan since 1989, when their father passed away. He knows this brother was a mechanic, but he does not know where his brother currently lives or works. To the best of his knowledge, his older brother has never held political office or served in the military. (Tr. 24; GX 2 at 5.) Applicant lived in Pakistan with his younger brother before coming to the United States, and he has email or telephone contact him about once a month. This brother is currently unemployed, has never held political office, and never served in the military. (GX 2 at 5-6.)

Applicant's mother-in-law is a citizen of Afghanistan who has resided in the United States with Applicant and his wife since September 2008. She is a permanent U.S. resident. (GX 2 at 6; Tr. 41.) Applicant's sister-in-law is a citizen of Afghanistan who resides in Pakistan. His three brothers-in-law are citizens of Afghanistan. One resides in England, and the other two reside in Pakistan. All three brothers-in-law are employed as mechanics. (Tr. 44-45.)

Applicant rents his home in the United States. He does not have any property or bank accounts in Afghanistan. (Tr. 47-48.)

In his counter-intelligence screening questionnaire, Applicant stated that he claims allegiance to Afghanistan and the United States. (GX 4 at 2.) At the hearing, he testified that if required to make a choice between the interests of Afghanistan and the United States, he would support the United States. (Tr. 49.) He held an Afghan passport, but he surrendered it to his security officer when he applied for the job as a linguist. (GX 4 at 3.)

I have taken administrative notice that Afghanistan has been an independent nation since 1919, and it was a monarchy until a military coup in 1973. Following a second military coup in 1978, a Marxist government emerged. In December 1979, the Soviet Union invaded and occupied Afghanistan, but they were resisted by freedom fighters known as mujahidin. The Soviet Union withdrew in February 1989 pursuant to an agreement signed by Pakistan, Afghanistan, the U.S., and the Soviet Union. The mujahidin were not a party to the agreement and refused to abide by it. The result was a civil war among several factions, including the Taliban. By the end of 1998, the Taliban controlled most of Afghanistan, committed atrocities against minority populations, and provided sanctuary to terrorist organizations. U.S. military forces, along with forces from a coalition partnership, forced the Taliban out of power by November 2001. With the assistance and support of the U.S., a new democratic government took office in 2004.

I also have noted that Afghanistan's human rights record is generally poor, due to the continuing insurgency, the weak government, and ongoing recovery efforts from two decades of war. In spite of efforts by the U.S. and the government of Afghanistan, it continues to be a violent, unsafe, unstable country. The weak government and internal instability have enabled hostile states, non-state actors, terrorists, and insurgents to continue operating in Afghanistan, including groups hostile to the U.S. Suicide bombing attacks continue to inflict large numbers of casualties.

I have taken administrative notice that Pakistan is a parliamentary federal republic with whom the U.S. has had diplomatic relations since 1947. Until 1990, the United States provided substantial military aid to Pakistan, but it was suspended as part of the sanctions imposed in response to Pakistan's nuclear weapons program. After September 11, 2001, the sanctions were suspended in recognition of Pakistan's support for the U.S. campaign against terrorism. Many Al Qaeda and Taliban fugitives use the loosely-controlled border regions between Afghanistan and Pakistan as a safe haven. Extremist groups in Pakistan target American and other Western interests, senior Pakistani officials, and members of minority indigenous and religious groups. Pakistan has a poor human rights record and suffers from wide-spread government corruption.

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.

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 about 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 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 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 brother is a citizen of Afghanistan, residing in Pakistan (¶ 1.a), another brother is a citizen and resident of Afghanistan (¶ 1.b), his mother-in-law is a citizen of Afghanistan, residing in the United States (¶ 1.c), and his sister-in-law and three brothers-in-law are citizens and residents of Afghanistan (¶¶ 1.d and 1.e). Applicant denied ¶¶ 1.d and 1.e. He testified that his sister-in-law resides in Pakistan, his two brothers-in-law reside in Pakistan, and one brother-in-law resides in England.

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 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. 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).

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). “[T]here is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse.” ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at * 8 (App. Bd. Feb. 20, 2002).

The evidence establishes that Applicant has significant family ties to Afghanistan and Pakistan. His two brothers are citizens of Afghanistan. His older brother resides in Afghanistan and his younger brother resides in Pakistan. While he has no contact with his older brother in Afghanistan, he communicates regularly with his younger brother in Pakistan, making him vulnerable to indirect coercion through his brother. Applicant’s mother-in-law resides with him in the United States, but his wife has frequent contact with her family members in Pakistan, making Applicant vulnerable to indirect coercion through his wife.

I conclude that Applicant’s family ties to Afghanistan and Pakistan raise three disqualifying conditions under this guideline: 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”); 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"); and AG ¶ 7(d) ("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."). There is no evidence that either Afghanistan or Pakistan target the United States for military or economic intelligence. However, the presence of hostile terrorist and insurgent organizations in both countries, Applicant's close ties with his younger brother, and his wife's close ties with her family members in Pakistan create the "heightened risk" contemplated by AG ¶¶ 7(a) and (b) and the "potential conflict of interest" contemplated by AG ¶ 7(b).

Since the Government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 7(a), (b), and (d), 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). Applicant's wife and mother-in-law reside with him in the United States, making it unlikely that they would be forced by terrorists or insurgents to make the hard choice between foreign interests and the interests of the United States. However, the presence of hostile terrorist and insurgent groups in Afghanistan and Pakistan, Applicant's close relationship with his brother in Pakistan, and his wife's close relationships with family members in Pakistan preclude 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, his wife, and his children are U.S. citizens. However, Applicant presented no evidence of community involvement, good duty performance, or a reputation for reliability and trustworthiness. I conclude that AG ¶ 8(b) is not established, because Applicant has failed to show that his relationships and loyalties in the United States are so deep and longstanding that he would resolve any conflict in favor of U.S. interests.

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). This mitigating condition is established for Applicant's older brother in Afghanistan, with whom he has no contact. It is not established, however, for his contacts with his younger brother in Pakistan or his wife's contacts with her family members in Pakistan.

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.

Applicant is a mature, educated adult. He came to the United States seeking a better life for himself and his family. Part of his motivation for seeking work as a linguist is economic. He was sincere and candid at the hearing. He and his wife have minimal connections to Afghanistan, but they both have strong family ties in Pakistan. He has no track record of working in an environment where strict adherence to rules and regulations is required.

After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the foreign influence concern raised by the citizenship and residence of his mother-in-law and his older brother in Afghanistan, but he has not mitigated the foreign influence concern raised by his younger brother, sister-in-law, and two brothers-in-law residing in Pakistan. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline B (Foreign Influence):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b-1.c:	For Applicant
Subparagraphs 1.d-1.e:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge