



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



In the matter of:)	
)	
XXXXXXXXXXXX, XXXXX)	ISCR Case No. 10-00413
)	
Applicant for Security Clearance)	

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: Bradford Westin III, Esq.

June 3, 2011

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns pertaining to Guidelines B (foreign influence), E (personal conduct), and H (drug involvement). Clearance is granted.

Statement of the Case

On February 13, 2009, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP).¹ On June 28, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines B (foreign influence), E (personal conduct), and H (drug involvement) for Applicant. The action was taken 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) effective within the Department of Defense for SORs after September 1, 2006.

¹ Applicant had previously submitted an e-QIP dated January 30, 2008. (GE 1.)

Applicant answered the SOR on July 17, 2010. Department Counsel was prepared to proceed on August 31, 2010. The case was assigned to me on September 1, 2010. On September 20, 2010, DOHA issued a notice of hearing scheduling the hearing for October 14, 2010. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 through 9, which were received without objection. The Applicant did not offer any exhibits, but did testify on his own behalf. I held the record open until October 28, 2010 to afford the Applicant an opportunity to submit additional evidence. Applicant timely submitted Applicant Exhibits (AE) A through F, which were received without objection. DOHA received the hearing transcript (Tr.) on October 22, 2010. The record closed on October 28, 2010.

Procedural and Evidentiary Rulings

Request for Administrative Notice

Department Counsel requested administrative notice of facts concerning Afghanistan. Department Counsel provided supporting documents to show detail and context for those facts. Applicant did not object, and I granted Department Counsel's request. (Tr. 26-28, Exhibit I (1-7).)

Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004) and *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). Usually administrative notice at ISCR proceedings is accorded to facts that are either well known or from government reports. See Stein, ADMINISTRATIVE LAW, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice).

Findings of Fact

Applicant denied all of the SOR allegations.

I note that English is Applicant's second language and as his counsel explained, ". . . my client speaks English relatively well. He understands it less well." (Tr. 25.) When Applicant was specifically queried on that point by his counsel, *i.e.* whether he understood English "relatively well enough" to be understood in the hearing, he answered in the affirmative. (Tr. 30.) I further note that Applicant had difficulty responding to questions and on occasion his answers were non-responsive or difficult to understand requiring further clarification. I did not detect that he was being intentionally non-responsive or deceptive, but rather was experiencing difficulty comprehending the questions or was having difficulty providing verbal responses.

Background Information

Applicant is a 52-year-old linguist, who has been employed by a defense contractor since February 2009. Before being recruited as a linguist, he was employed as a tow truck driver at his brother's tire store from April 2008 to February 2009. Applicant speaks four languages – Pashto, Farsi, Urdu, and English. He seeks a security clearance which is a condition of his employment. (GE 7, Tr. 55-57, 76-77, 144-145.) Applicant is currently driving a taxi for a living pending his prospective job as a linguist. (Tr. 101-102.)

Applicant completed the equivalent of high school in Afghanistan and graduated in September 1977. He immigrated to the United States in 1986 in a refugee status, and joined his parents and other siblings who were already residing in the United States. (GE 9, Tr. 41, 61, 63-64.) He became a naturalized U.S. citizen in August 1996, and his most recent U.S. passport was issued in June 2007. Applicant married his wife in the United States in April 1994. She, like him, was born in Afghanistan. She became a naturalized U.S. citizen in November 2007. Applicant and his wife have four minor children. All of his children are U.S. citizens. (GE 7, Tr. 57-60, 62-63.)

Foreign Influence

Several security issues were identified under this concern based on Applicant's immediate Afghan family connections, his having a relative in Afghanistan, that a purported former Taliban member was residing in his father's home in Afghanistan, and that he was eligible to inherit a potentially large interest in property located in Afghanistan. As the evidence developed, these concerns were either mitigated or refuted.

Applicant comes from a large Afghan family consisting of his parents and ten children. The SOR alleged that Applicant had two brothers who are citizens of Afghanistan and reside in the United States. (SOR ¶ 1c.) (SOR Response, GE 9.) His father passed away in June 2010, four months before his hearing. Foreign influence concerns as they pertain to Applicant's father are no longer pertinent. (SOR ¶ 1a.) (GE 1, Tr. 33-34, 60.)

Applicant, his parents, and his siblings were all born in Afghanistan. The majority of Applicant's siblings spent their formative years in Afghanistan. (GE 4, Tr. 17.) Applicant's parents immigrated to the United States approximately 28 years ago in 1983. His father was a mechanic and his mother was a homemaker during her adult life. Although Applicant's mother is still living, she is 70 years old and in poor health. (GE 1, Tr. 33, 80-81.) His parents did not become U.S. citizens after immigrating to the United States, but did hold valid "green cards." After immigrating to the United States, Applicant's parents returned to Afghanistan only one time for a one-month family visit in "1995 or 1996." (GE 9, Tr. 34.) All of Applicant's siblings live in the United States. (GE 9.)

The SOR correctly states that two of Applicant's brothers are citizens of Afghanistan and residents of the United States. (SOR ¶ 1c.) However, of the ten siblings, eight are U.S. citizens. (SOR Answer, Tr. 72, 94-97.) One of Applicant's brothers (B1) has been serving as a linguist in Afghanistan with U.S. Special Forces since April 2008. B1 holds a "high clearance" and has been in-country since April 2008 except for two-week vacations every six months. B1 did return to the United States for a brief visit in June 2010 to attend his father's funeral. B1 owns a tire store and a younger brother (B2) manages B1's tire business, discussed *infra*. (Tr. 65-71.)

The SOR alleges that Applicant has a "friend," who is a citizen and resident of Afghanistan. (SOR ¶ 1e.) Applicant stated that he is at a loss to respond to this allegation because he does not know what "friend" the SOR refers to. He added that any friend he might have is loyal to the United States. He surmised that the SOR may be referring to his mother's brother (his uncle), who Applicant and his family in the United States send "a couple of hundred dollars each year." (SOR ¶ 1d.) Applicant described his uncle as elderly and destitute and the money his family sends him is for food and shelter. (SOR Answer, Tr. 38-40, 83.)

Applicant's grandfather used to own property in Afghanistan before he died. To the best of Applicant's knowledge, several different groups in power may have lived on the property. In any event, Applicant had no control over who occupied the property nor did he have control over the duration of their stay. Applicant described his grandfather's house as "not large and not on 6,000 acres and not worth \$36,000,000." Furthermore, Applicant has no inheritance rights to the property that his grandfather owned nor does he own any property in Afghanistan. (Tr. 83-94.)

The SOR alleges that a former Taliban member resides in Applicant's father's home in Afghanistan and that Applicant may possibly inherit an interest in 6,000 acres in Afghanistan valued at approximately \$36 million. (SOR ¶¶ 1f and 1e.) The source document that formed the basis of these allegations is a Counterintelligence (CI) and Security Screening Questionnaire and Expansion of Information of SF85/86 prepared in January 2008. (GE 2, GE 3.) The originator of these forms is unknown. The forms purport to provide answers that Applicant gave in response to questions; however, they do not bear the identity of the person or persons responsible for preparing the forms nor do they have any authenticating signatures. Their probative value is of limited application given the fact that Applicant has submitted credible evidence countering the accuracy of material contained in the forms.

Applicant's father did not own a home in Afghanistan before he died. No member or former member of the Taliban lived or lives in a home belonging to Applicant's father in Afghanistan because his father did not own a home there. Applicant further stated that no one lives with his grandfather in Afghanistan. (SOR Answer, Tr. 35-37.)

Before immigrating to the United States, Applicant fought with the Mujahedeen “Freedom Fighters” from 1977 to 1986 against the Soviet Union. (GE 9, Tr. 41-42, 73.) He stated he was a commander with “150 people under (his) command.” Applicant described his method of fighting as a Mujahedeen as “guerilla war, guerilla fight” in which his forces wintered over in Pakistan and brought the fight against the Soviets to Afghanistan during the warmer weather months. (Tr. 141-144.)

All of Applicant’s assets are in the United States. He owns three separate real properties and conducts all of his banking in the United States. (AE A – F, Tr. 102-103.) He is registered to vote in the United States, and exercises all of his rights as a U.S. citizen. Although Applicant was born in Afghanistan, he considers the United States to be his home.

Personal Conduct

The SOR lists five separate falsification allegations. First, Applicant is alleged to have falsified his January 2008 e-QIP when asked whether he had ever been charged with or convicted of any offenses related to alcohol or drugs. He answered “no” to this question. The Government produced credible evidence, *i.e.* FBI arrest record, which indicated that: (1) Applicant had been arrested in January 1989 and charged with unlawful possession of marijuana; and (2) Applicant had been arrested in September 1993 and charged with possession of a narcotic controlled substance and the charge was dismissed for lack of sufficient evidence. (SOR ¶¶ 2a and 2b.) (Tr. 117-118, 131-133.)

Regarding the January 1989 arrest, Applicant explained the circumstances surrounding this purported arrest. He stated that the police found “a little piece of marijuana” in the uniform he had been issued as a security guard. He also stated the police had a warrant for his arrest for a speeding ticket and remembered being placed in handcuffs, but adamantly asserted that he was not arrested. (Tr. 43-48.) His SOR Answer provided a similar explanation, but added that he retained a private attorney who enrolled him in a “Deferred Entry of Judgment” program and the charge was dismissed. (SOR Answer, Tr. 113-115.)

Regarding the September 1993 arrest, Applicant again explained the circumstances surrounding this purported arrest. He stated that he was driving a tow truck at the time and was pulled over for a defective turn signal. When stopped, he informed the police that he left his driver’s license at home. The police would not allow him to drive without a license and gave him a ride to the police station. The police searched the tow truck and found “marijuana or something.” Applicant testified that there were other tow truck drivers who drove that truck and adamantly asserted that he was not arrested. (Tr. 48-54.) His SOR Answer provided a similar explanation. However, with regard to this arrest, Applicant provided an official court record from the county where the arrest purportedly occurred, *i.e.*, Criminal Record Search Request, indicating that a record search on behalf of the Applicant was conducted in July 2010.

The record search confirmed that no arrest record was found pertaining to Applicant, thus corroborating his assertion. (SOR Answer, Tr. 116-118, 134-135.)

Second, Applicant is alleged to have falsified his January 2008 e-QIP when asked whether he had ever illegally used a controlled substance such as marijuana in the last seven years. He answered “no” to this question. (SOR ¶ 2b.) He indicated in his SOR Answer that he did not think that question included a single use of marijuana. Knowing what he knows now, he would have disclosed his single marijuana use. (SOR Answer.) When queried by Department Counsel on this point, Applicant stated, “my reading is not that much good [sic].” He added on redirect examination that he knew that he had already disclosed his marijuana use at the December 2007 Christmas party stating, “Yeah. Because I – I don’t write that second batch because already they know my file there [sic].” (Tr. 111, 136-138.)

Third, the SOR alleges that Applicant falsified material facts when he initially reported that his first marijuana use in the United States occurred in December 2007 in a January 2008 interview and purportedly later stated in the same interview that he uses marijuana approximately every two months. (SOR ¶ 2c.) See discussion *supra*, which discusses concerns regarding the contents of this interview. Applicant indicated in his SOR Answer that he admitted to the investigator that he had used a small amount of marijuana in December 2007. He added that he has not smoked marijuana in several years and does not intend to ever do so again. (SOR Answer.) He testified that he was at a Christmas party in December 2007 and had “one hit.” During questioning by Department Counsel, Applicant clarified that he did not smoke marijuana every two months and that the person who interviewed him in January 2008 misunderstood him. Applicant added that he would not have passed his drug test for his current employer had he been smoking marijuana every two months. He further reiterated on cross-examination that his most recent drug use was limited to smoking marijuana, *i.e.* single use, at a Christmas party in December 2007. (Tr. 108-110, 118-123, 126-127, 136.) Applicant stated that he has not used drugs since then nor does he intend to use drugs in the future.

Fourth, Applicant is alleged to have falsified his February 2009 e-QIP when asked whether he had ever been charged with or convicted of any offenses related to alcohol or drugs. He answered “no” to this question. (SOR ¶ 2d.) See discussion under “First” paragraph *supra*.

Fifth, Applicant is alleged to have falsified his February 2009 e-QIP when asked whether he had ever illegally used a controlled substance such as marijuana in the last seven years. He answered “no” to this question. (SOR ¶ 2e.) See discussion under “Second” paragraph *supra*. He added in his SOR Answer that he had already disclosed his marijuana use that he did not think he needed to disclose it again. (SOR Answer.)

Drug Involvement

Applicant's drug use is limited to a one-time marijuana use that occurred at a December 2007 Christmas party, discussed *supra*.

Character Evidence

Applicant's younger brother (B2) testified on his behalf. He manages his older brother's (B1) tire store, who has been serving as a linguist for the U.S. Army in Afghanistan since 2008, discussed *supra*. B2 immigrated to the United States from Afghanistan when he was approximately two years old. B2 described his family as being very loyal to the United States. He discussed B1's service in Afghanistan and corroborated the Applicant's testimony and statements regarding family members. (Tr. 149-160.)

Afghanistan

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 2009, the population was about 28 million people with about 3,000,000 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-jackings, assaults, or hostage takings. 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 safe or immune from violence.

The United States-Afghan relationship is summarized as follows:

After the fall of the Taliban, the U.S. supported the emergence of a broad-based government, representative of all Afghans, and actively encouraged a [United Nations] role in the national reconciliation process in Afghanistan. The U.S. has made a long-term commitment to help Afghanistan rebuild itself after years of war. The U.S. and others in the international community currently provide resources and expertise to Afghanistan in a variety of areas, including humanitarian relief and assistance, capacity-building, security needs, counter-narcotic programs, and infrastructure projects.

During his December 1, 2009 speech at West Point, President Barack Obama laid down the core of U.S. goals in Afghanistan, which are to disrupt, dismantle, and defeat al-Qaeda and its safe havens in Pakistan, and to prevent their return to Afghanistan. . . . The United States is willing to support fully the ambitious agenda set out by the recently re-elected Afghan president, focusing on reintegration, economic development, improving relations with Afghanistan regional partners, and steadily increasing the security responsibilities of the Afghan security forces.

U.S. Department of State, *Background Note: Afghanistan*, Mar. 26, 2010 (HE 4, enclosure I at 13). The United States has more combat troops deployed to Afghanistan than to any other foreign country. This extraordinary commitment to Afghanistan is balanced against the inherent dangers of the ongoing conflict in Afghanistan to citizens and residents of Afghanistan.

Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs 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 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 to reach his decision.

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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "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. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or 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 and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[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

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concerns are under Guidelines B (foreign influence), E (personal conduct), and H (drug involvement).

Foreign Influence

AG ¶ 6 explains the security concern about “foreign contacts and interests” stating:

if the individual has divided loyalties or foreign financial interests, [he or she] 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.

AG ¶ 7 indicates two conditions that could raise a security concern and may be disqualifying in this case:

(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; and

(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.

AG ¶¶ 7(a) and 7(b) apply. Applicant, his parents, his wife, his siblings, and his uncle were all born in Afghanistan. His uncle, who is elderly, lives in Afghanistan. Two of his brothers are still citizens of Afghanistan, as well as his mother. Applicant and his family members send a modest amount of money to their elderly uncle living in Afghanistan on an annual basis. Applicant has frequent contact with his mother and siblings and to a lesser extent with his elderly uncle in Afghanistan. Applicant’s relationship with his family members, particularly with his brother serving as a linguist in Afghanistan, creates “a heightened risk of foreign inducement, manipulation, pressure, or coercion.”

The mere possession of close family ties with a family member living in Afghanistan, is not, as a matter of law, disqualifying under Guideline B. However, if an applicant has a close relationship with even one relative, living in a foreign country, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. See *Generally* ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

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 or inducement. 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 collection operations against the United States. The relationship of Afghanistan with the United States, places a significant, but not insurmountable, burden of persuasion on Applicant to demonstrate that his relationships with his family members living in Afghanistan do not pose a security risk. Applicant should not be placed into a position where he might be forced to choose between loyalty to the United States and a desire to assist a family member living in Afghanistan.

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, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. See ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002).

While there is no evidence that intelligence operatives from Afghanistan seek or have sought classified or economic information from or through Applicant or his family, nevertheless, it is not possible to rule out such a possibility in the future. International terrorist groups are known to conduct intelligence activities as effectively as capable state intelligence services, and Afghanistan has an enormous problem with terrorism. Applicant's relationship with family members living or residing in Afghanistan creates a potential conflict of interest because this relationship is sufficiently close to raise a security concern about his desire to assist family members in Afghanistan by providing sensitive or classified information. Department Counsel produced substantial evidence of Applicant's contacts with his brother serving as a linguist and to a lesser extent his uncle and has raised the issue of potential foreign pressure or attempted exploitation. Also, there may be some overlap of Applicant's brother serving as linguist in Afghanistan at the same time. AG ¶¶ 7(a) and 7(b) apply, and further inquiry is necessary about potential application of any mitigating conditions. Applicant successfully refuted the accuracy of allegations regarding a "friend," who is a citizen and resident of Afghanistan, as well as allegations regarding a former Taliban member residing in his father's home in Afghanistan, and his possible inheritance of property in Afghanistan. Further discussion of these allegations is not warranted.

AG ¶ 8 lists six conditions that could mitigate foreign influence security concerns including:

(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.;

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

(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;

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

(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; and

(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.

AG ¶¶ 8(a) and 8(c) have limited applicability. Applicant, along with other family members in the United States, send a modest amount of money to an elderly uncle in Afghanistan and Applicant's brother is temporarily serving as a linguist in Afghanistan with the U.S. Army. Because of these connections to Afghanistan, Applicant is not able to fully meet his burden of showing there is "little likelihood that [his relationships with his relatives who are Afghanistan citizens or residents] could create a risk for foreign influence or exploitation."

AG ¶ 8(b) fully applies. A key factor in the AG ¶ 8(b) analysis is Applicant's "deep and longstanding relationships and loyalties in the U.S." Applicant has established that "[he] can be expected to resolve any conflict of interest in favor of the U.S. interest." In 1986, Applicant emigrated from Afghanistan to the United States. He became a U.S. citizen in 1996. Applicant's wife became a U.S. citizen in 2007. His four children are U.S. citizens. Applicant has strong family connections to the United States. Eight of the ten siblings in Applicant's family to include him, are U.S. citizens and all ten siblings, as well as their mother, reside in the United States. Applicant owns three separate real properties in the United States and conducts all of his banking in the United States. In contrast, he has no assets in Afghanistan. Applicant

and his family are fully vested in the United States. Most importantly, Applicant wants a clearance so that he can again assist U.S. Armed Forces in Afghanistan in a combat zone. He is willing to risk his life to support United States' goals in Afghanistan. He has shown his patriotism, loyalty, and fidelity to the United States. Applicant has a brother, who has been serving as a linguist in Afghanistan since 2008.

Applicant's relationship with the United States must be weighed against the potential conflict of interest created by his relationships with uncle living in Afghanistan and his brother who is serving as a linguist in Afghanistan. There is no evidence, however, that terrorists, criminals, the Afghan Government, or those conducting espionage have approached or threatened Applicant or his family in Afghanistan to coerce Applicant or his family for classified or sensitive information.² Applicant, his brother serving in Afghanistan, and his uncle are clearly targets for improper coercion, exploitation, and violence.

It is important to be mindful of the United States' huge investment of manpower and money in Afghanistan, and Applicant and as well as his brother, who is a linguist working for the U.S. Government, have and are supporting U.S. goals and objectives in Afghanistan. Applicant and his brother serving as a linguist in Afghanistan are potential targets of terrorists and the Taliban for their own activities and support for the United States, and Applicant's potential access to classified information is unlikely to add significantly to the risk they already face from lawless elements in Afghanistan.

AG ¶¶ 8(d) and 8(e) do not apply. The U.S. Government has not encouraged Applicant's involvement with family members living in Afghanistan. Applicant is not required to report his contacts with family members living in Afghanistan. Lastly, AG ¶ 8(f) does not apply as the evidence does not support the assertion that Applicant has any assets in Afghanistan. All of Applicant's assets are in the United States.

In sum, Applicant's connections to family living in Afghanistan are less substantial than his strong connections and ties to the United States. His connections to the United States taken together are sufficient to fully overcome the foreign influence security concerns under Guideline B. Even if concerns are not mitigated under Guideline B, they would be mitigated under the Whole-Person Concept, discussed *infra*.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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

² There would be little reason for U.S. enemies to seek classified information from Applicant because she has not had access to such information.

and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying in this case in regard to the allegation Applicant provided false or incomplete information on his security clearance applications:

(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

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Five separate allegations of falsification trigger application of AG ¶¶ 16(a) and 16(b) because Applicant provided incorrect answers about his arrests and past drug use during the security clearance vetting process. Further review is necessary.

AG ¶ 17 provides seven conditions that could mitigate personal conduct security concerns in this case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant consistently stated when he completed his e-QIPs that he had not been arrested and that his drug use was limited to a one-time use of marijuana during a December 2007 Christmas party. His submission of primary source evidence rebutting the Government's allegation that he was arrested for drug use in September 1993 significantly enhanced his credibility as it pertains to his January 1989 purported arrest. Furthermore, after observing Applicant, I found him to be a credible witness. His difficulty with English manifested itself throughout the hearing. He evidently became confused when responding to questions. Furthermore, he self-reported his single marijuana use in December 2007, which would have been difficult to discover had he not disclosed this incriminating, derogatory information.

Applicant's assertions were subsequently corroborated, in whole or in part. Applicant acknowledged his answers were incorrect, but added that there was no intent on his part to deliberately falsify his e-QIPs or information provided during his January 2008 interview. Furthermore, the accuracy of the source documents that formed the basis of Applicant's purported falsification, particularly the results of his January 2008 interview, were seriously undermined. Of note, he disclosed or revealed his sole marijuana use in December 2007 when he could easily have denied it. Such self-reporting, albeit not consistent, put the Government on notice that he had used marijuana in December 2007.

A statement is false when it is made deliberately. An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it or misunderstood the question. Applicant was candid and forthright at his hearing about his purported arrests and marijuana use. In evaluating his testimony, I note his memory has faded somewhat over time and his English comprehension, both oral and written, is far from fluent.

Applicant's testimony and demeanor strongly support the notion that he is an honest individual. Also persuasive was the testimony of his younger brother, who corroborated Applicant's testimony regarding their family. I conclude Applicant's alleged falsification of his e-QIP is mitigated. Although he provided incorrect information, AG ¶ 17(f) fully applies. The falsification allegations are not substantiated. I am satisfied he did not deliberately and intentionally fail to disclose his past drug use

with intent to deceive. His arrests were either not substantiated or he did not understand he was being arrested.³

Guideline H, Drug Involvement

The Government cross-alleged this allegation with SOR ¶ 2c, *supra*. Discussions referencing this allegation previously discussed are incorporated under this heading.

AG ¶ 24 articulates the security concern concerning drug involvement:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

The Government established that Applicant used marijuana one time at a December 2007 Christmas party. A review of the evidence supports application of two drug involvement disqualifying conditions. AG ¶ 25(a): "any drug abuse (see above definition);"⁴ and AG ¶ 25(c) "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia."

Considering the totality of the circumstances in this case, I find application of drug involvement mitigating conditions AG ¶ 26(a) "the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;" and AG ¶ 26(b): "a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation."

³The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

⁴ AG ¶ 24(b) defines drug abuse as the illegal use of a drug or use of a legal drug in a manner that deviates from approved medication direction.

Concerning AG ¶ 26(a), there are no “bright line” rules for determining when conduct is “recent.” The determination must be based “on a careful evaluation of the totality of the record within the parameters set by the Directive.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.”⁵

AG ¶ 26(a) applies. Applicant’s last drug use was December 2007, about 46 months before his hearing. His illegal drug use occurred spontaneously at a Christmas party at a time before Applicant ever contemplated applying for a security clearance. Applicant realizes his behavior was wrong and not consistent or compatible with holding a security clearance. The absence of evidence of more recent or extensive drug use, and his promise not to use illegal drugs in the future eliminates doubts about his current reliability, trustworthiness, or good judgment with respect to abstaining from illegal drug use.⁶

⁵ ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge’s decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle change and therapy. For the recency analysis the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) (“The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant’s efforts at alcohol rehabilitation.”) (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, considered the recency analysis of an administrative judge stating:

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

⁶ In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the administrative judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse.

AG ¶ 26(b) lists four ways Applicant can demonstrate his intent not to abuse illegal drugs in the future. Applicant does not associate with individuals who use drugs nor does he frequent environments where drug activity occurs. He is a responsible husband and father, who seeks to serve his country and is willing to place himself in harm's way in Afghanistan as a linguist. Of particular note, he has abstained from drug abuse for about 46 months and has had no problem in doing so. AG ¶ 26(b) applies.

At his hearing, Applicant acknowledged that future drug abuse is incompatible with his future career and family plans, and manifested a steadfast commitment to continue lifestyle changes consistent with total abstinence of marijuana or any other drugs.

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):

- (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 Guidelines B, E, and H in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under this guideline, but some warrant additional comment.

There are some facts supporting a foreign influence security concern because of Applicant's connections to Afghanistan. Applicant, his parents, and siblings were all born in Afghanistan. Applicant has an uncle in Afghanistan with whom he maintains somewhat frequent contact by participating as a family to send him modest amounts of money each year. Applicant's brother is serving as a linguist in Afghanistan.

A Guideline B decision concerning Afghanistan must take into consideration the geopolitical situation and dangers there.⁷ Afghanistan is a dangerous place because

⁷ See ISCR Case No. 04-02630 at 3 (App. Bd. May 23, 2007) (remanding because of insufficient discussion of geopolitical situation and suggesting expansion of whole person discussion).

of violence from the Taliban and terrorists. The Taliban and terrorists continue to threaten the Afghan Government, the interests of the United States, U.S. Armed Forces, and those who cooperate and assist the United States. Applicant recognizes his work with the U.S. Armed Forces will endanger him and expose him to considerable risk. The United States and Afghan Governments are allies in the war on terrorism. The United States is committed to the establishment of a free and independent Afghan Government. Afghanistan and the United States have close relationships in diplomacy and trade.

The circumstances tending to support approval of a clearance for Applicant are more substantial than the factors weighing towards denial of his clearance. Since 1987, Applicant has made the United States his home. He has embraced his life in the United States, gotten married in the United States, and has made a good living in the United States. Applicant's closest family members to include his mother, wife, and four children live in the United States and well as his nine other siblings and their families. His four children are enrolled in school and are spending their formative years in the United States. Applicant has substantially greater contacts or connections with the United States than with Afghanistan. Applicant does not own property in Afghanistan. When he was naturalized as a U.S. citizen, he swore allegiance to the United States.

Applicant is willing to risk his life as part of his duties on behalf of the U.S. combat forces in Afghanistan. His past experience after serving nine years as a Mujahedeen commander waging war against the Soviets provides him with unique regional insight. Applicant is fully aware of the risks to himself, and he is also aware that his brother serving as a linguist in Afghanistan is at risk from terrorists and the Taliban. All these circumstances demonstrate that Applicant will recognize, resist, and report any attempts by a foreign power, terrorist group, or insurgent group to coerce or exploit him. See ISCR Case No. 07-00034 at 2 (App. Bd. Feb. 5, 2008). Applicant's strong connections to the United States and especially to his U.S. family, community, and his desire for employment as a translator in a combat zone establish "such deep and longstanding relationships and loyalties in the U.S., [he] can be expected to resolve any conflict of interest in favor of the U.S. interest." See Discussion of AG ¶ 8(b), *supra* at pages 12-13.

Applicant's incomplete and incorrect descriptions of his past drug use placed his credibility into question. The Government relies on each applicant for a security clearance to thoroughly and accurately respond to questions asked on a security clearance application. Information applicants provide forms the basis to grant or deny security clearances. Applicant's failure to provide accurate and complete information required further costly and time-consuming inquiries that could have been avoided. Fortunately for Applicant, his lack of due diligence was not imputed to be intentional or deliberate.

Applicant has been and is willing to maintain conduct expected of one entrusted with a security clearance. His family fully supports him. He has a history of a strong work ethic. This support and self-introspection should ensure his continued success.

Applicant demonstrated the correct attitude and commitment to remaining drug-free. Considering his demeanor and testimony, I believe Applicant has learned from his mistakes, and his questionable behavior is unlikely to recur. In sum, I find Applicant has presented sufficient evidence of rehabilitation. Applicant is living a lifestyle consistent with someone who wishes to remain drug free. He remains committed to his family and is a responsible and contributing member of society.

After weighing all the facts and circumstances in this decision, including Applicant's demeanor and sincerity at his hearing, I find his statements to be credible, and I conclude he has carried his burden of mitigating the foreign influence, personal conduct, and drug involvement security concerns.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole-person factors"⁸ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has mitigated the Government's case. For the reasons stated, I conclude he is eligible for access to classified information.

Formal Findings

Formal findings For or Against Applicant 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: Subparagraphs 1a - 1g:	FOR APPLICANT For Applicant
Paragraph 2, Guideline E: Subparagraphs 2a – 2e:	FOR APPLICANT For Applicant
Paragraph 3, Guideline H: Subparagraph 3a:	FOR APPLICANT For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Robert J. Tuider
Administrative Judge

⁸See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

