



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



In the matter of:)
)
) ISCR Case No. 10-00781
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esq., Department Counsel
For Applicant: *Pro se*

January 30, 2012

Decision

RIVERA, Juan J., Administrative Judge:

Applicant has siblings and extended family members that live in Afghanistan. However, he established deep and longstanding relationships and loyalties in the United States and he can be expected to resolve any conflict of interest in favor of the U.S. interest. He mitigated the foreign influence and personal conduct security concerns raised. Clearance is granted.

Statement of the Case

Applicant submitted three security clearance applications (SCA), the most recent on December 12, 2008. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request for a security clearance.

¹ Required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; and Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as revised.

On June 8, 2010, DOHA issued Applicant a Statement of Reasons (SOR), alleging security concerns under Guideline B (Foreign Influence) and Guideline E (Personal Conduct) of the adjudicative guidelines (AG).² Applicant answered the SOR on June 22, 2010, and requested a decision without a hearing. The Government requested a hearing before an administrative judge. (Tr. 23) On October 6, 2010, the case was assigned to another administrative judge. At the time, Applicant was employed by a government contractor and deployed to Afghanistan in support of U.S. troops. Because he could not return to the United States, a video teleconference (VTC) hearing was scheduled for November 11, 2010. The VTC was cancelled because of the unavailability of a VTC facility in Afghanistan. The case was returned to the DOHA administrative section for conversion of the case to a decision without a hearing.

On November 3, 2011, Applicant informed Department Counsel that he had returned to the United States, and requested an expedited hearing. (Hearing exhibit (HE) 1) The case was assigned to me on November 14, 2011. DOHA issued a notice of hearing that same day, convening a hearing on November 15, 2011. At the hearing, the Government offered exhibits (GE) 1 through 16. GE 16 was not admitted, but was considered for purposes of taking administrative notice. Applicant testified, and presented exhibits (AE) 1 and 2. AE 2 was received post-hearing. All exhibits were made part of the record without objections. DOHA received the hearing transcript (Tr.) on November 21, 2011.

Procedural Issue

On November 3, 2011, Applicant requested an expedited hearing. At his hearing, on November 15, 2011, he affirmed that he had sufficient time to prepare and was ready to proceed. He waived his right to 15 days advanced notice of his hearing. (HE 1; Tr. 24-25)

Findings of Fact

Applicant admitted the factual allegations in SOR ¶¶ 1.b, 1.c, and 1.d, with explanations. He denied the SOR allegations under ¶¶ 1.a and 2.a. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence, and having observed Applicant's demeanor and considered his testimony, I make the following findings of fact.

Applicant is a 68-year-old linguist working for a government contractor in support of deployed U.S. military forces. Applicant, his first wife, his children, and his immediate and extended family members were born and raised in Afghanistan. From 1958 until 1963, he attended a technical training school in Afghanistan and received a certificate of completion. He attended college in India for approximately one year during 1965-1966. Applicant served one year in the Afghan army in his early 20s, around 1967.

² Adjudication of this case is controlled by the AGs, implemented by the DOD on September 1, 2006.

Applicant has been married twice. He married his first wife in 1962, and they divorced in 1996. He has six adult children, ages 31 to 48, of this marriage. All of them were born in Afghanistan, but they are now naturalized U.S. citizens living in the United States. Applicant remarried in 1999. His wife was then a Bangladesh citizen living in the United States. She became a naturalized U.S. citizen in November 2006.

When Applicant completed his December 2008 SCA, he indicated that his 38-year-old son was an Afghan citizen living in the United States with a U.S. Permanent Resident Card (Green Card). (SOR ¶ 1.a) His son became a naturalized U.S. citizen in 2009, and he is a U.S. resident.

In 1979-1980, the Soviet Union invaded Afghanistan. Applicant fled Afghanistan afraid for his life. Two of his brothers and two cousins were killed between 1979 and 1980, and many young Afghan men were being detained by the Soviets and never seen again. In August 1980, Applicant made the pilgrimage to Mecca and stayed working in Saudi Arabia for approximately eight years. He assumed financial responsibility for the wives of his two dead brothers and a dead cousin, as well as their combined 14-15 children. All of them were living with Applicant's wife and his children in Afghanistan.

In April 1989, Applicant moved from Saudi Arabia to Pakistan, because the Saudis did not want to give him status as a refugee and advised him to move to Pakistan. He was in Pakistan around two months. During that time, he paid \$10,000 for certain forged documents that allowed him to enter the United States illegally. Applicant was granted asylum, worked as a taxi driver for a number of years, and became a naturalized U.S. citizen in January 1996.

From 1999 until 2008, Applicant worked for a fast food restaurant and became manager of the store. In 2007, Applicant learned of the U.S. government need for linguists and applied for employment. He was hired by his current employer, a government contractor, in October 2008. Since then, he has been deployed twice to Afghanistan working as a linguist in support of deployed U.S. troops. As part of his job, Applicant accompanied U.S. Special Forces in patrolling missions and came under enemy fire on a couple of occasions. The Government conceded that Applicant placed himself in harm's way. (Tr. 114.)

Applicant's rating indicates he has excellent language skills and capabilities. He displayed good work ethic, and exceeded his job performance requirements. He received a certificate of appreciation for his performance in support of a U.S. Special Forces Group. (AE 1)

Applicant is very proud of his work for the U.S. forces. He considers himself to be a good, loyal American citizen, and he loves living in the United States. His current salary is approximately \$150,000 a year. Applicant has no property or financial interests in Afghanistan. All of his financial and proprietary interests are in the United States.

Applicant traveled to Afghanistan in 1992, 1996, 2003, 2004, and 2006-2007, to visit his siblings and extended family members living in Afghanistan. In 1992, he travelled to visit his wife, children, sister (65), stepbrother (75), and extended family all of whom were then living in Afghanistan. In 1992, he took \$10,800 to Afghanistan. Of that money, \$5,000 was his personal money, which he earned working as a taxi driver. The remainder was provided to him by Afghan friends living in the United States who asked him to take their money back to their families.

From around 1989 until October 2008, Applicant sent money to his siblings in Afghanistan. Prior to October 2008, he had contact with his siblings, on the average, every two months. Applicant stopped having contact with and sending money to his siblings in October 2008. He explained that they no longer needed his financial support. Moreover, Applicant is afraid that if Taliban followers found out about his employment assisting U.S. forces, it could place his family members in Afghanistan in harm's way. Applicant's siblings have not worked for the Afghan government and have not been associated with the Taliban or other groups with interests inimical to the United States. He has not visited his relatives in Afghanistan since 2007.

SOR ¶ 2.a alleges that Applicant's son's mother-in-law is a citizen of Afghanistan living illegally in the United States in Applicant's residence. Applicant's documentary evidence established that the person in question was a naturalized German citizen when she entered the United States in 2003 with a valid U.S. visa. She is now a U.S. Green Card holder.

I take administrative notice of the following facts. Afghanistan is located in Southwestern Asia and borders Pakistan, Iran and Russia. It has been an independent nation since 1919, after the British relinquished control. A monarchy ruled from 1919 until a military coup in 1973. Following a Soviet-supported coup in 1978, a Marxist government emerged. In 1979, Soviet forces invaded and occupied Afghanistan. A resistance movement eventually led to an agreement known as the Geneva Accords, signed by Afghanistan, Pakistan, the United States, and the Soviet Union, which ensured Soviet forces withdrew by February 1989. The resistance party was not part of the Accords and refused to accept it. A civil war ensued after the Soviet withdrawal. In the mid-1990s, the Taliban rose to power largely due to anarchy and the existence of warlords. The Taliban sought to impose extreme interpretation of Islam and committed massive human rights violations. The Taliban also provided sanctuary to Osama Bin Laden, al Qaida, and other terrorist organizations.

After the September 11, 2001, terrorist attacks, demands to expel Bin Laden and his followers were rejected by the Taliban. U.S. forces and a coalition partnership commenced military operations in October 2001 that forced the Taliban out of power in 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 terrorists target United States and Afghan interests by suicide operations, bombings, assassinations, carjacking, assaults, and hostage taking. At this

time, the risk of terrorist activity remains extremely high. The country's human rights record remains poor and violence is rampant.

Civilians continue to bear the brunt of the violence and increased attacks. Despite the loss of some key leaders, insurgents have adjusted their tactics to maintain momentum following the arrival of additional U.S. forces. It is suspected that the Taliban was most likely responsible for suppressing voter turnout in the August 2009 elections in key parts of the country. The Taliban's expansion of influence in northern Afghanistan since late 2007 has made the insurgency a country-wide threat.

Afghan leaders continue to face the eroding effect of official corruption and drug trade. Criminal networks and narcotics constitute a source of funding for the insurgency in Afghanistan. Other insurgent groups and anti-coalition organizations also operate in Afghanistan. Insurgents have targeted non-government organizations, journalists, government workers, and United Nation workers. Instability along the Pakistan-Afghan frontier continued to provide al Qaida with leadership mobility and the ability to conduct training and operational planning, targeting Western European and U.S. interests. The United States Department of State has declared that the security threat to all American citizens in Afghanistan remains critical as no part of the country is immune to violence.

Policies

The Secretary of Defense may 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

Guideline B, Foreign Influence

The government’s concern under AG ¶ 6 is that:

Foreign contacts and interests may be a security concern 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 sets out conditions that could raise a security concern and may be disqualifying in this case, including:

(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.

The mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if only one relative lives in a foreign country and an applicant has contacts with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information.³ Applicant, by himself or through his family, had frequent contacts and a close relationship of affection and/or obligation with his siblings and other extended family members who are residents and citizens of Afghanistan. The extent of his close relationship is demonstrated by his frequent contacts, his providing financial support for relatives in Afghanistan, and his frequent travel to visit with his family in Afghanistan.

These contacts create a risk of foreign pressure or attempted exploitation because there is always the possibility that Afghan agents, criminals, or terrorists operating in Afghanistan may exploit the opportunity to obtain information about the United States. With its negative human rights record, its government, and the violent insurgency that operates within the Afghan borders, it is conceivable that Applicant's family members could be vulnerable to coercion.

The Government produced substantial evidence raising these two potentially disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove a mitigating condition. As previously indicated, the burden of disproving a mitigating condition never shifts to the Government.

Three Foreign Influence Mitigating Conditions under AG ¶ 8 are potentially applicable to these disqualifying conditions:

(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.;

³ See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

(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; and

(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.

After considering the totality of the facts and circumstances in Applicant's case, I conclude that the above mitigating conditions apply. Applicant's contacts in Afghanistan were not casual, infrequent, or minimal. However, his last visit to Afghanistan was in 2007. Since October 2008, Applicant has avoided contacting his relatives in Afghanistan, and stopped sending them financial assistance. Specifically, he is concerned that, if members of the community became aware of his current occupation, it may place his family members at unnecessary risk.

In deciding whether Applicant's family members are in a position to be exploited, I considered Afghanistan's form of government.⁴ 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 burden of persuasion on Applicant to demonstrate that his relationships with his relatives and extended family members living in Afghanistan do not pose a security risk. Applicant should not be placed in a position where he might be forced to choose between loyalty to the United States and a desire to assist his relatives living in Afghanistan who might be coerced by terrorists, criminals, or governmental entities in that country.

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,

⁴ The focus is not the country or its people, but its rulers and the nature of the government they impose. This approach recognizes that it makes sense to treat each country in accordance with the level of security concern or threat it presents to 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).

There is no evidence that intelligence operatives, terrorists, or criminals from Afghanistan seek or have sought classified or economic information from or through Applicant, his siblings, or other relatives living in Afghanistan. However, we cannot rule out such a possibility in the future. There is evidence of insurgency operations being conducted in Afghanistan against American forces. There is also evidence that Afghanistan has active terrorist groups operating within its borders. The conduct of terrorists in Afghanistan makes it more likely that terrorists would attempt to coerce Applicant through his relatives living in Afghanistan, if they determined it was advantageous to do so. This places the burden of persuasion on Applicant to demonstrate that his contacts in Afghanistan do not pose a security risk, and he is not in a position to be forced to choose between loyalty to the United States and his connections to family members.

Applicant's relationship with the United States must be weighed against the potential conflict of interest created by his relationship with his family members living in Afghanistan. Applicant left Afghanistan in 1979-1980. His wife and children immigrated to the United States in the mid-1990s. He was granted asylum in 1989. He has made the United States his home since 1989, and has been a productive U.S. citizen since 1996. Applicant, his current wife, and his children have established strong connections to the United States. His wife and all of his children are citizens and residents of the United States. All of his financial and property interests are in the United States. He is doing well living the American dream, and has demonstrated that his loyalties are to the United States.

In 2008, Applicant volunteered to assist the United States in its war against terror. He has been working for a government contractor supporting U.S. troops deployed to Afghanistan, and in the process he has placed himself in harm's way. He is considered to be an excellent linguist and a valuable employee. Additionally, since October 2008, Applicant has avoided contact with his relatives living in Afghanistan. There is no evidence that he has compromised or caused others to compromise classified information

In cases of this nature, an additional analysis is necessary. The Appeal Board has stated:

As a general rule, an applicant's prior history of complying with security procedures and regulations is considered to be of relatively low probative value for the purposes of refuting, mitigating, or extenuating the security concerns raised by that applicant's more immediate disqualifying conduct or circumstances. However, the Board has recognized an exception to that general rule in Guideline B cases, where the applicant has established by credible, independent evidence that his compliance with security procedures and regulations occurred in the context of dangerous, high-risk

circumstances in which the applicant had made a significant contribution to the national security. The presence of such circumstances can give credibility to an applicant's assertion that he can be relied upon to recognize, resist, and report a foreign power's attempts at coercion or exploitation.⁵

Applicant was deployed to Afghanistan twice since October 2008. As a result of his duties accompanying U.S. Special Forces, he was placed in high-risk circumstances while supporting U.S. troops. According to the evidence presented, he complied with the security procedures and regulations.

Considering Applicant's actions under dangerous circumstances in conjunction with his age, his 23 years living in the United States (16 as a U.S. citizen), his wife and six children being U.S. citizens and residents, and all of his financial and proprietary interests are in the United States, the evidence supports a determination that his ties and sense of obligation to the United State are sufficiently strong that he could be expected to resolve any conflict of interest in favor of the United States, even under circumstances detrimental to his relatives in Afghanistan.⁶ On balance, and considering the evidence as a whole, Applicant mitigated the Guideline B security concerns.

Concerning the Guideline E allegation, the record evidence established that the allegation is unsubstantiated. Applicant's son's mother-in-law entered the United States as a German citizen with a U.S. visa. She is currently a U.S. Green Card holder, legally residing in the United States. AG ¶ 17(f) applies.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c). I have incorporated my comments under Guideline B in my whole-person analysis. Considering the evidence as a whole, Applicant's ties and sense of obligation to the United State are sufficiently strong that he could be expected to resolve any conflict of interest in favor of the United States, even under circumstances detrimental to his relatives in Afghanistan

⁵ ISCR Cases No. 06-25928 at 4 (App. Bd. Apr 9, 2008) (internal citations omitted). See also ISCR Case No. 05-03846 at 6 (App. Bd. Nov. 14, 2006) (citing ISCR Case No. 01-03357 at 4 (App. Bd. Dec. 13, 2005); ISCR Case No. 02-10113 at 5 (App. Bd. Mar. 25, 2005); ISCR Case No. 03-10955 at 2-3 (App. Bd. May, 30, 2006); ISCR Case No. 04-12363 at 2 (App. Bd. July 14, 2006); ISCR Case No. 04-12363 at 2 (App. Bd. July 14, 2006).)

⁶ See ISCR Case No. 05-03846 at 6 (App. Bd. Nov 14, 2006).

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:	FOR APPLICANT
Subparagraphs 1.a - 1.d:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge