



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 10-03594
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esq., Department Counsel
For Applicant: *Pro se*

06/29/2012

Decision

HEINY, Claude R., Administrative Judge:

Applicant’s parents and siblings are citizens of Afghanistan living in Afghanistan or Pakistan. He has worked for the U.S. Army as a linguist for two-and-one-half years. His relatives do not know he is living and working in Afghanistan. An attack by a suicide bomber placed him in the hospital for a week. He was offered six months of convalescence leave, but returned to his unit in Afghanistan after one month. Applicant has rebutted or mitigated the security concerns under foreign influence and personal conduct.

Statement of the Case

Applicant contests the Department of Defense’s (DoD) intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued

¹ Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security*

a Statement of Reasons (SOR) on November 29, 2011, detailing security concerns under Guideline B, Foreign Influence, and Guideline E, Personal Conduct.

On January 7, 2012, Applicant answered the SOR and elected to have the matter decided without a hearing. He asserted having a hearing would have required him to return to the United States and he did not know how long such a trip would keep him away from his unit. Department Counsel submitted the Government's case in a File of Relevant Material (FORM), dated February 8, 2012. The FORM contains five attachments. On April 25, 2012, Applicant submitted a response to the FORM. Department Counsel did not object to the response, which was admitted into the record. On June 14, 2012, I was assigned the case.

Procedural Rulings

Department Counsel requested administrative notice of facts concerning the Islamic Republic of Afghanistan (Afghanistan) and provided supporting documents to show detail and context for those facts. Applicant did not object or agree to the administrative notice request.

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)); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings is to notice 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). I marked the documents as Ex. Exhibits I to VI.

See the Afghanistan section of the Findings of Fact of this decision, *infra*, for the facts accepted for administrative notice.

Findings of Fact

In Applicant's Answer to the SOR, he neither admitted nor denied the factual allegations in SOR ¶ 2.a. He admitted the remaining allegations. I incorporate Applicant's admissions to the SOR allegations as findings of fact. After a thorough review of the pleadings and exhibits, I make the following additional findings of fact:

Applicant is a 47-year-old linguist who has been working for the U.S. Army in Afghanistan since October 2009. In 1964, he was born in Afghanistan where he went to high school and college. In September 2001, he became a U.S. citizen. In July 1986, in Afghanistan, he married his wife, then a citizen of Afghanistan. (Ex. 4) She is now a

Clearance Review Program (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

naturalized U.S. citizen. (Ex. 4) His oldest two children were born in Afghanistan and his two youngest children were born in the United States. His wife and children reside in the United States. His house (Fair Market Value of \$350,000), his bank account (\$80,000), his truck (\$15,000), and his car (\$10,000) are all in the United States. (Ex. 5) He has no financial obligations or legal obligations in a foreign country. (Ex. 5)

Applicant's parents, three of his brothers, and his sister are citizens and residents of Afghanistan. He also has a brother and sister who are citizens of Afghanistan residing in Pakistan. (Ex. 3) When he completed his Electronic Questionnaires for Investigations Processing (e-QIP), dated October 22, 2009, he listed his parents, brothers, sisters, and parents-in-law, and indicated they were citizens of Afghanistan. (Ex. 4) He also indicated they were living in Afghanistan or Pakistan.

Applicant stated in his response to the FORM:

. . . for the past two and a half years and since I started this job and many years prior to that, I have had no contacts with my family members in Afghanistan or Pakistan. As a matter of fact my parents that live in Afghanistan are not even aware that I am working in Afghanistan and believe that I still work and live in the U.S. I did not want to jeopardize their lives by letting them know of my presence in Afghanistan and my work with the U.S. military.

He has little knowledge about his siblings. He stated:

. . . I have no knowledge of my family members (brothers and sisters) and their whereabouts, I do not concern myself with them and I should not be punished for not keeping up to date with them. They know nothing of my life and I know nothing about theirs and I would like to keep it that way. I do have a family of my own in U.S. and they are my main concern.

Applicant's duties in Afghanistan require him to go on convoy missions almost daily in dangerous areas. He must go into areas with Taliban sympathizers and question suspects and ordinary people. On one mission, he was injured, as were all the members of the team, when the convoy was attacked by a suicide bomber. He was wounded and spent a week in a hospital in Germany recovering from his wounds. He was offered six months convalescence leave with pay, but chose to return to Afghanistan after one month. He did so because of his sense of duty and loyalty to his unit, as well as his commitment to the U.S. mission in Afghanistan. He suffers from damage to one eye and is in continuous pain resulting from the bombing.

Although facing danger continuously, Applicant feels good about and finds it satisfying to use his linguistic expertise to help his military colleagues. He believes the mission and safety of his team members comes first.

Applicant declined a hearing because he believed such a request would result in him having to return to the United States for an uncertain amount of time, which would place his team in danger and the U.S. mission at risk.

On August 28, 2011, Applicant completed an interrogatory related to foreign influence, contacts, travel, and assets. (Ex. 5) The SOR alleges he deliberately omitted his foreign family members from that form. (Ex. 1) In his response to the SOR, Applicant neither admitted nor denied deliberately omitting his family members from the interrogatory. (Ex. 3) Department Counsel (DC) deemed his lack of a response to the allegation a denial. In his April 2012 response, Applicant states that any discrepancy on the questionnaire was an oversight and not a deliberate act.

The interrogatory, as presented in the FORM, fails to present any question asking about immediate family members' foreign residence or citizenship. The interrogatory, as presented, failed to list a question 9 and question 10, 10.a, and 10.b. The hand written numbers at the lower right hand corner of the interrogatory goes from "154" to "165," skipping page 156.

Applicant answered "no" to Question 13 of the interrogatory, which asks if he has ever had contact with a foreign citizen. Applicant's parents and siblings are foreign citizens, but the FORM fails to establish he has had recent contact with his family members. He answered "no" to question 23, which asked if he owed a duty, obligation, or responsibility to any foreign person. The FORM fails to establish that he has any duty, obligation, or responsibility owed to his siblings or parents.

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-jacking, assaults, or hostage taking. At this time, the risk of terrorist activities remains extremely high. The country's human rights record remains poor and violence is rampant. According to recent reports from the U.S. Department of State, insurgents continue to plan attacks and kidnappings of Americans and other Western nationals. Travel warnings are ongoing. No section of Afghanistan is 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*, November 28, 2011. (Ex. I) 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

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶

2(c), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

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

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

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

Section 7 of Executive Order (EO) 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline B, Foreign Influence

The foreign influence concern is set forth at 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.

An applicant's ties to a foreign country, through family members or others, can raise a foreign influence concern. At the same time, there is no *per se* rule against applicants with familial ties to a foreign country, even hostile countries. Instead, an applicant with familial ties to a country, such as Afghanistan, bears a "very heavy burden" in mitigating the foreign influence concern raised by their familial ties.²

Applicant was born in Afghanistan and became a naturalized U.S citizen. His parents and siblings live in Afghanistan. He also has siblings living in Pakistan. His relatives are sufficient to raise a foreign influence concern, and the following disqualifying conditions under 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; 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.³

As noted above, Applicant's foreign connections and contacts do not end the Guideline B analysis. Nor is Applicant required to cut off all contact with his relatives to meet his burden.⁴ Instead, he has the "very heavy burden" of demonstrating that one or more of the following pertinent mitigating conditions under AG ¶ 8 applies and, more importantly, that such is sufficient to mitigate the serious security concerns at issue:

- (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

² ISCR Case No. 10-09986 at 3 (App. Bd. Dec. 15, 2011) (In examining a case involving an applicant with familial ties to Iran, the Appeal Board held: "We note, first of all, that an applicant with family members in a country that is hostile to the U.S. bears a "very heavy burden" to show that the family members are not a means of coercion or exploitation.").

³ I considered AG ¶ 7(c), but Applicant does not share living quarters with his parents.

⁴ ISCR Case No. 07-13739 at 4 (App. Bd. Nov. 12, 2008) ("To the extent that the Judge's statement about ties to the former country implies or asserts that *any* such ties automatically create a situation of heightened risk, that statement is error. Obviously, the nature and strength of those ties is important in an accurate assessment of the overall risk, and there is no requirement under the Directive that an applicant sever all ties with a foreign country before he or she can be granted access to classified information.") (emphasis in original).

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; and
- (c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk of foreign influence or exploitation.

Applicant rebutted the presumption that he is close to his parents and siblings in Afghanistan and Pakistan.⁵ He has not had contact with his family members for many years prior to working with the U.S. military, which started two and a half years ago. He does not keep up with his family members in Afghanistan or Pakistan. They are unaware of the nature of his employment or that he is under consideration for a security clearance. At the same time, I cannot overlook the obvious family dynamic, which implicates serious concerns due to the nature of the situation in Afghanistan and the threat to his family members should it become known he is working with the U.S. military. Therefore, I find that AG ¶¶ 8(a) and (c) partially apply, but would be insufficient on their own to mitigate the foreign influence concern.

On the other hand, I find that AG ¶ 8(b) applies and, together with the above, mitigates the foreign influence concern. Applicant has strong connections to the United States. His wife and children live in the United States, who are his main concern. All of his assets including his house, bank account, and vehicles are in the United States. Applicant has no foreign property or foreign financial interest. His goal is to use his linguistic expertise to help his military colleagues.

Applicant's loyalty to the United States is unquestionable. He was not only injured in the performance of his duties, but turned down paid convalescence leave in order to return to Afghanistan one month after his release from the hospital. While performing his duty with the U.S. military, he was injured and is in continuous pain.

In weighing Applicant's strong connections to the United States with the lack of contact he has had with his parents and siblings, I find that he would resolve any potential conflict in favor of national security. Applicant met his burden of persuasion and mitigated the foreign influence concern.

⁵ *Contrast with* ISCR Case No. 08-02715 (App. Bd. Mar. 9, 2010) (Applicant speaks with her father, a general in Country X, once every other week).

Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶15:

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

The following personal conduct disqualifying conditions potentially apply to the facts of this case:

AG ¶ 16(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).

Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government, when applying for a security clearance, is a security concern. But the document presented is incomplete and fails to establish a falsification. The SOR alleges Applicant failed to list his foreign family members on an August 2011 interrogatory. The incomplete interrogatory, as presented in the FORM, does not include questions regarding foreign family members. DC assumed Applicant's non-response to this allegation in his SOR response was a denial, which placed the burden on DC to present evidence establishing the allegation. This DC did not do. Applicant listed all of his foreign relatives in his e-QIP. He denies any deliberate falsification of the interrogatory.

DC has failed to prove Applicant deliberately failed to disclose information about his immediate family being foreign citizens. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully.

The evidence, as presented in the FORM, fails to establish any deliberate omissions, concealments, or falsifications in the interrogatory. I find for him as to personal conduct.

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 relevant 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has put himself in harm's way in order to support U.S. security interests. He was injured in the performance of that duty and chose to return to the mission early. He is keenly aware of the danger to his family members should it become known he is supporting the U.S. military mission. His parents and siblings are in Afghanistan and Pakistan. He does not concern himself with what these family members do or their whereabouts. His main concern is with his family in the United States. I find Applicant to be loyal to the United States and would do nothing to compromise U.S. interests. Based on the record as presented, I find no falsification by Applicant in completing the interrogatory. He made a complete listing of all of his relatives on his e-QIP and I find there would be no recognizable benefit for him to not list these same individuals when he completed the interrogatory.

Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his foreign influence and personal conduct.

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, Foreign Influence:	FOR APPLICANT
Subparagraphs 1.a – 1.f:	For Applicant
Paragraph 2, Personal Conduct:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

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

CLAUDE R. HEINY II
Administrative Judge