



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 10-06615
)
 Applicant for Security Clearance)

Appearances

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

August 25, 2011

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines B (Foreign Influence) and F (Financial Considerations). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on April 12, 2010. On February 4, 2011, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines B and F. DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on April 4, 2011; answered it in an undated document; and did not state whether he wanted a hearing. DOHA received his answer

on March 10, 2011. Department Counsel requested a hearing and was ready to proceed on May 28, 2011. The case was assigned to me on June 3, 2011. Scheduling of the hearing was delayed because Applicant was deployed to Afghanistan. DOHA issued a notice of hearing on June 15, 2011, scheduling the hearing for July 20, 2011. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 8 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through D, which were admitted without objection. Department Counsel submitted a demonstrative exhibit outlining the evidence, which is attached to the record as Hearing Exhibit (HX) I. Department Counsel requested that I take administrative notice of relevant facts about Afghanistan, and I took administrative notice as requested. The request to take administrative notice and supporting documents are attached to the record as HX II. DOHA received the transcript (Tr.) on July 28, 2011.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a-1.e and denied the allegation in SOR ¶ 2.a. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 44-year-old linguist employed by a defense contractor. He has worked for his current employer since April 2010. He has never held a security clearance.

Applicant has been deployed to Afghanistan since July 2010, assisting in the training of the Afghanistan National Army. His military supervisor, a U.S. Army sergeant first class, describes him as reliable and intelligent. (AX A.) He has received a certificate of appreciation for his duty performance. (AX B.)

Applicant was born in Afghanistan. He graduated from a university in Afghanistan in 1993 with a bachelor's degree in economics. He worked for a company that sold eggs from 1993 to 1995. In January 1995, he paid a smuggler to take him to Germany, where he believed he would have a better life. The smuggler provided him with a false Afghan passport and took him to Poland. An accomplice of the smuggler took him by automobile to a German city, but he was caught by police and sent back to Poland twice. On his third try, he was sent to a refugee camp in Germany, where he worked on a farm. (GX 4 at 3; Tr. 43-46.)

In 1999, while living in Germany, Applicant married a naturalized U.S. citizen. In October 2000, he came to the United States and was admitted as a permanent resident based on his marriage to a U.S. citizen. (GX 5 at 5-6.) He became a U.S. citizen in June 2006. (GX 1 at 7; Tr. 5 at 5-6.) He worked at a fast-food restaurant until he began working for his current employer. (GX 1 at 16; Tr. 49-50.)

Applicant divorced his wife in January 2002. No children were born during the marriage. (GX 1 at 22; GX 4 at 4.)

Applicant's father, now deceased, held political office in Afghanistan from about 1965 to 1969. (Tr. 53.) Applicant's mother, one brother, and one sister are citizens and residents of Afghanistan. Applicant talks to his mother and sister in Afghanistan about twice a month.

Applicant's family fled to Pakistan after the Russian invasion of Afghanistan. Between 2001 and 2007, he sent between \$500 and \$700 per month to his mother, a brother, and a sister while they were refugees in Pakistan. They returned to Afghanistan in 2007. (GX 3 at 4, 6.)

Applicant also has a brother and sister who are citizens and residents of Germany. (GX 1 at 23-27.) This brother works for an electric company, and his spouse works intermittently as a housekeeper. (Tr. 55-58.) This sister and her spouse are intermittently employed in restaurants and grocery stores. (Tr. 62-64.) It has been about a year since he talked to this brother and two years since he has talked to this sister. (Tr. 72-73.)

Applicant's mother has never worked outside the home. His brother lives with their mother and works for a construction company in Afghanistan. (Tr. 52.) Applicant's sister in Afghanistan and her spouse are physicians. This sister and her spouse both worked for the Afghanistan Health Ministry, but she is now employed by a private agency. (Tr. 66-68.)

In April 2010, Applicant told a security investigator that his family knew that he had applied for a job with the U.S. Government and would be coming to Afghanistan. He also told his family that he would not be able to visit them. (GX 4 at 11.)

During an interview with a security investigator in May 2010, Applicant mentioned that he had an Afghan girlfriend with whom he conversed by telephone about once a week. (GX 3 at 5.) At the hearing, Applicant stated that he had not talked to her since April 2010, and that he had no current girlfriends. (Tr. 70.)

Applicant has owned a home in the United States since June 2005. He gave inconsistent explanations for not making timely payments on his mortgage. In May 2010, he told a security investigator that he deliberately did not make payments on the mortgage for eight months because a friend advised him to stop making payments in order to qualify for a loan modification at a more favorable interest rate. (GX 3 at 3.) In November 2010, he responded to DOHA interrogatories by stating he was unable to afford the payments on his house until he began his current job. (GX 3 at 17.) I find the May 2010 explanation more plausible, because he had owned the home and held the same job for about five years before he stopped making payments. In July 2010, the lender obtained a judgment against him for the entire amount of the loan. (GX 6 at 1.) He paid the amount past due, and the judgment was vacated in December 2010. (AX D.)

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

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

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the

possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline B, Foreign Influence

The SOR alleges that Applicant’s mother, brother, sister, and girlfriend are citizens and residents of Afghanistan (¶¶ 1.a-1.d). It also alleges that from 2001 to 2007 he sent between \$500 and \$700 per month to his family residing in Pakistan (¶ 1.e). The security concern under this guideline is set out in AG ¶ 6:

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.

Two disqualifying conditions under this guideline are relevant to this case: 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 AG ¶ 7(b) (“connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual’s obligation to protect sensitive information or technology and the individual’s desire to help a foreign person, group, or country by providing that information”). When foreign family ties are involved, the totality of an applicant’s family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003).

AG ¶ 7(a) requires substantial evidence of a “heightened risk.” The “heightened risk” required to raise this disqualifying condition is a relatively low standard. “Heightened risk” denotes a risk greater than the normal risk inherent in having a family member living under a foreign government.

Guideline B is not limited to countries hostile to the United States. “The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States.” ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

Furthermore, “even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security.” ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. Nevertheless, the nature of a nation’s government, its relationship with the United States, and its human rights record are relevant in assessing the likelihood that an applicant’s family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence operations against the United States. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. *See generally* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where administrative judge did not consider terrorist activity in area where family members resided).

Applicant's admissions in response to the SOR and at the hearing are sufficient to establish the allegations in SOR ¶¶ 1.a-1.c. The facts are sufficient to raise the disqualifying conditions in AG ¶¶ 7(a) and (b).

The evidence shows that Applicant's relationship with an Afghan girlfriend in Afghanistan, alleged in SOR ¶ 1.d, ended more than a year ago. Thus, I conclude that SOR ¶ 1.d is not established. The financial aid to Applicant's family while they were refugees in Pakistan, alleged in SOR ¶ 1.e, is evidence of his close relationship with family members in Afghanistan, but it has no independent security significance. Thus, I have resolved SOR ¶ 1.e for Applicant.

Security concerns under this guideline can be mitigated by showing that "the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S." AG ¶ 8(a). While Afghanistan does not have a record of conducting military or economic espionage against the United States, the various insurgent and terrorist groups active in Afghanistan who target civilians and U.S. interests in Afghanistan preclude application of this mitigating condition.

Security concerns under this guideline also can be mitigated by showing "there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest." AG ¶ 8(b). Applicant's sense of obligation to his family is not "minimal." He has been a U.S. citizen since 2006, but he has no family members in the United States, and his only ties to the United States are his residence and his job. I conclude that this mitigating condition is not established.

Security concerns under this guideline also may be mitigated by showing that "contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation." AG ¶ 8(c). There is a rebuttable presumption that contacts with an immediate family member in a foreign country are not casual. ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002). Applicant has not rebutted this presumption, and his family contacts are frequent and regular. Thus, I conclude that this mitigating condition is not established.

Guideline F, Financial Considerations

The SOR alleges an unsatisfied judgment against Applicant for about \$168,000. The concern under this guideline is set out in AG ¶ 18:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or

unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Applicant denied the allegation and provided evidence that the past-due debt has been paid and judgment has been vacated. The evidence reflects that Applicant stopped making payments on his home mortgage in order to qualify for a loan modification. This evidence is sufficient to raise two disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts") and AG ¶ 19(c) ("a history of not meeting financial obligations").

Security concerns based on financial problems can be mitigated by showing that "the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment." AG ¶ 20(a). Only one debt is alleged, but it arose from eight delinquent payments. The debt was recent and did not occur under circumstances making recurrence unlikely. I conclude that this mitigating condition is not established.

Security concerns under this guideline also can be mitigated by showing that "the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances." AG ¶ 20(b). Both prongs, i.e., conditions beyond the person's control and responsible conduct, must be established. Applicant presented no evidence of conditions beyond his control. Following the bad advice of a friend, he intentionally defaulted on his mortgage payments in order to qualify for a loan modification. This mitigating condition is not established.

Security concerns under this guideline also can be mitigated by showing that "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." AG ¶ 20(d). Good faith means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). When Applicant learned that his request for a loan modification had not been approved and the lender had obtained a judgment against him, he paid the debt in full. I conclude that this mitigating condition is established.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guidelines B and F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant has been deployed to Afghanistan since July 2010 and apparently has performed well as a linguist. His supervisor regards him as reliable. Nevertheless, his family ties make him vulnerable. I am not convinced that his ties to the United States are strong enough to ensure that he will resolve any conflict between the interests of his family and United States in favor of the United States.

After weighing the disqualifying and mitigating conditions under Guidelines B and F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on financial considerations, but he has not mitigated the security concerns based on foreign influence. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

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

| | |
|--|-------------------|
| Paragraph 1, Guideline B (Foreign Influence): | AGAINST APPLICANT |
| Subparagraphs 1.a-1.c: | Against Applicant |
| Subparagraphs 1.d-1.e: | For Applicant |
| Paragraph 2, Guideline F (Financial Considerations): | FOR APPLICANT |
| Subparagraph 2.a: | For Applicant |

Conclusion

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

LeRoy F. Foreman
Administrative Judge