



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



In the matter of:)
)
-----) ISCR Case No. 10-11020
)
Applicant for Security Clearance)

Appearances

For Government: Gina Marine, Esq., Department Counsel
For Applicant: Joseph Testan, Esq.

06/22/2012

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for a security clearance. He is unable to mitigate the foreign influence security concern stemming from his family ties to Afghanistan. Likewise, he is unable to mitigate the personal conduct concern stemming from his high-risk sexual behavior, which demonstrates poor judgment, while working for a defense contractor in support of the U.S. armed forces in Afghanistan. Accordingly, this case is decided against Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on or about October 4, 2011, the Defense Office of Hearings and Appeals (DOHA) sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant Applicant access to classified information. The SOR is similar to a complaint, and it detailed the reasons for the action under the security guidelines known as Guideline B for foreign influence, Guideline E for personal conduct, and Guideline F for financial considerations.

Applicant timely answered the SOR and requested a decision without a hearing. In turn, Department Counsel timely requested a hearing,² and Applicant confirmed that he had no objection to a hearing.³ The hearing took place May 1, 2012. The transcript (Tr.) was received May 17, 2012.

Procedural Matters

Without objections, I took administrative or official notice of certain facts concerning the country of Afghanistan per Department Counsel's written requests.⁴ The essential facts are set forth below.

Findings of Fact

The gravamen of the SOR is as follows: (1) under Guideline B, Applicant is subject to a foreign influence security concern because of his family ties to Afghanistan; (2) under Guideline E, Applicant is subject to a personal conduct concern due to (a) falsification of answers to questions on security clearance applications submitted in 2005 and 2009, and (b) high-risk sexual behavior during 2002–2008, most of which took place while working for a defense contractor in support of the U.S. armed forces; and (3) under Guideline F, Applicant is subject to a financial considerations concern due to a Chapter 7 bankruptcy case, which was filed in 2003 and discharged in 2004. His answer to the SOR was mixed with admissions, denials, and brief explanations. His admissions

¹ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

² Directive, Enclosure 3, ¶ E3.1.7 (Department Counsel must request a hearing within 20 days of receipt of an applicant's answer to the SOR).

³ Tr. 9–10.

⁴ Appellate Exhibits I and II; Tr. 17–19.

are accepted and adopted and incorporated herein as findings of fact. In addition, the following findings of fact are supported by substantial evidence.

Applicant is a 41-year-old employee of the federal government. He is seeking to obtain an industrial security clearance to work as a Pashto linguist for a defense contractor, which is sponsoring his security clearance application. His educational background includes a bachelor's degree awarded in 1992 from a university in Afghanistan and attendance at U.S. colleges. His recent employment history includes the following: (1) a retail store owner-operator during 2002–2004, which ended in the Chapter 7 bankruptcy case; (2) a Pashto linguist for a defense contractor during 2004–2005; and (3) an assistant professor of Pashto for the federal government from August 2005 to present.

Applicant is a native of Afghanistan. He emigrated from Pakistan in 1993, entering the United States as a refugee. Seven years later in 2000, he obtained U.S. citizenship through the naturalization process. He married in 2005, and the couple have two young children, both of whom are native-born U.S. citizens. His spouse is also a native of Afghanistan, she is a permanent resident alien of the United States, and she has applied to become a naturalized U.S. citizen.⁵

In addition to his wife and children, Applicant's immediate family no longer live in Afghanistan. His mother, four brothers, and a sister are U.S. citizens who reside in the United States. His father, who served as high-ranking officer in the Afghan Army, was also a U.S. citizen before he recently passed away.

Applicant's spouse has multiple family members living in Afghanistan. Her mother, father, and ten siblings are citizens of and residents in Afghanistan. She maintains regular contact (as frequently as weekly) with her family members. Applicant is not well acquainted with his in-laws, whom he describes as rural people and farmers who have no direct connection to the Afghan government or military.

In the past, Applicant had contact (once every three to four months) with a cousin, who is also his wife's brother.⁶ That contact has decreased in recent years, and Applicant feels no sense of obligation toward this individual.

Applicant sends money to Afghanistan once a year as a charitable act required by his religious faith. He previously sent the money to a cousin, but now sends the annual contribution to his father-in-law. All of Applicant's financial interests are in the United States. He has no financial interests in Afghanistan or any other foreign country. Besides the 2004 Chapter 7 bankruptcy case, there is no other evidence of financial problems, and his current financial situation appears to be stable.

⁵ Exhibit A.

⁶ Tr. 68–69.

Applicant completed and submitted security clearance applications in August 2005 and November 2009.⁷ In doing so, he was required to answer a variety of questions about his background. In his 2005 application, he did not disclose his Chapter 7 bankruptcy case, which was discharged in 2004, in response to a question asking if he had filed a bankruptcy petition in the last seven years. In his 2009 application, he did not disclose two cousins in Afghanistan (alleged in SOR ¶¶ 1.e and 1.g) in response to a question asking about maintaining foreign contacts. He disclosed the Chapter 7 bankruptcy case in the 2009 application. He acknowledges the correct answer to both questions was “yes” and maintains that he did not fully understand the questions. Applicant expounded upon his explanation at the hearing, and his explanation is accepted as credible. In making this credibility finding, I note that English is not Applicant’s native language and I have given him some leeway in this regard.

In 2008, Applicant was going through pre-employment screening with an agency of the federal government. During that process, Applicant disclosed the high-risk sexual behavior that forms the basis for those allegations under Guideline E. He also acknowledged his conduct in response to interrogatories from DOHA.⁸ Those matters are summarized or condensed as follows:

- In 2002 while traveling in Mexico, Applicant went to a nightclub where a stripper propositioned him. He went to a private room with the woman, but decided not to engage in sexual intercourse with her. He nevertheless paid her \$50 for her time.
- On three occasions in 2004, Applicant engaged the services of Afghan prostitutes. He did so while employed for a defense contractor in support of the U.S. armed forces in Afghanistan.
- In 2004 and 2008, Applicant called massage parlors and solicited sexual services by asking what “something extra” would cost. The 2008 solicitation took place when he was going through pre-employment screening with an agency of the federal government. He denies any intent to obtain sexual services in 2008, claiming he was bored and decided to call and inquire.

Concerning Applicant’s country of birth, after the 1979 invasion and subsequent withdrawal of the then Soviet Union, Afghanistan experienced a civil war among several factions, including the Taliban. By the end 1998, the Taliban controlled most of Afghanistan and provided sanctuary to Osama bin Laden, al-Qaida, and other terrorists groups. U.S. military forces, along with forces from a coalition partnership, forced the Taliban from power by November 2001. With U.S. assistance and support, a new democratic government took office in 2004, which continues to this day. In spite of efforts by the United States and the Afghan government, Afghanistan continues to be a violent, unsafe, and unstable country that is subject to terrorists attacks and suicide

⁷ Exhibits 1 and 2.

⁸ Exhibit 6.

bombings. Afghanistan's human rights record is generally poor, due to the continuing insurgency, the weak government, and ongoing recovery efforts from years of war.

Law and Policies

It is well-established law that no one has a right to a security clearance.⁹ As noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."¹⁰ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.¹¹ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹²

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹³ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁴ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁵ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁶ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹⁷ The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹⁸

⁹ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

¹⁰ 484 U.S. at 531.

¹¹ Directive, ¶ 3.2.

¹² Directive, ¶ 3.2.

¹³ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁴ Directive, Enclosure 3, ¶ E3.1.14.

¹⁵ Directive, Enclosure 3, ¶ E3.1.15.

¹⁶ Directive, Enclosure 3, ¶ E3.1.15.

¹⁷ *Egan*, 484 U.S. at 531.

¹⁸ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.¹⁹ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Discussion

In analyzing this case, I will address the three guidelines in the reverse order in which they were alleged, starting with the financial considerations guideline.

Under Guideline F for financial considerations,²⁰ the suitability of an applicant may be questioned or put into doubt when that applicant has a history of excessive indebtedness or financial problems or difficulties.²¹ The overall concern under Guideline F is:

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.²²

Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information within the defense industry.

The evidence supports a conclusion that Applicant has a history of financial problems or difficulties as shown by the 2004 Chapter 7 bankruptcy case. The evidence

¹⁹ Executive Order 10865, § 7.

²⁰ AG ¶¶ 18, 19, and 20 (setting forth the security concern and the disqualifying and mitigating conditions).

²¹ ISCR Case No. 95-0611 (App. Bd. May 2, 1996) (It is well settled that "the security suitability of an applicant is placed into question when that applicant is shown to have a history of excessive indebtedness or recurring financial difficulties.") (citation omitted); and see ISCR Case No. 07-09966 (App. Bd. Jun. 25, 2008) (In security clearance cases, "the federal government is entitled to consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner.") (citation omitted).

²² AG ¶ 18.

also raises a security concern because it indicates an inability to satisfy debts²³ and a history of not meeting financial obligations²⁴ within the meaning of Guideline F. Nevertheless, the concern is mitigated because it was caused by a business failure, there is no evidence of similar conduct, and his current financial situation is stable.²⁵

Under Guideline E for personal conduct,²⁶ the suitability of an applicant may be questioned or put into doubt due to false statements and credible adverse information that may not be enough to support action under any other guideline. The overall security concern under Guideline E is:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that may] 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.²⁷

A statement is false when it is made deliberately (knowingly and willfully). An omission of relevant and material information is not deliberate if, for example, the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

Turning first to the two falsification allegations, as noted in the findings of fact, I am not persuaded that Applicant made deliberately false statements when he answered the specified questions on security clearance applications in 2005 and 2009. Instead, he gave incorrect answers because he did not fully understand the questions. His honest mistakes in this regard do not raise a security concern.

Turning next to the high-risk sexual behavior that took place during 2002–2008, that conduct does raise a security concern.²⁸ With that said, I have no concern about the 2002 incident because it occurred about ten years ago when Applicant was on a private trip to Mexico, and before he had any employment affiliation with the U.S. Government or a defense contractor. But his conduct in 2004 and 2008 was high-risk behavior that demonstrated poor judgment. He put himself in a position that created a potential vulnerability to exploitation, manipulation, or duress. These matters cannot be mitigated

²³ AG ¶ 19(a).

²⁴ AG ¶ 19(c).

²⁵ AG ¶¶ 20(a) and (b).

²⁶ AG ¶¶ 15–17 (setting forth the security concern and the disqualifying and mitigating conditions).

²⁷ AG ¶ 15.

²⁸ AG ¶ 16(e).

in light of his dubious explanation for calling the massage parlor in 2008, when away from home for pre-employment screening with an agency of the federal government. His explanation—that he was bored and had no intention of following through—is a half truth, at best. There is no requirement to believe the unbelievable, and his explanation is simply not believable. His failure to provide full, frank, and candid information during the hearing not only undermines his credibility, it also casts doubt about how he would conduct himself if again deployed to Afghanistan in support of the U.S. armed forces. No mitigation is available under these circumstances.

Under Guideline B for foreign influence,²⁹ the suitability of an applicant may be questioned or put into doubt due to an applicant's foreign connections and interests. The overall concern under the guideline is:

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.³⁰

Given the evidence of Applicant's family ties to Afghanistan, which continues to be a violent, unsafe, and unstable country, the Government has established its case under Guideline B. In reaching this conclusion, I considered the following disqualifying condition:

AG ¶ 7(a) contact with a foreign family member, business, or professional associate, friend, or other person who is a citizen of or a resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.

The guideline also provides that certain facts and circumstances may mitigate the foreign influence security concern. Given the evidence, I have considered the following mitigating conditions as most pertinent:

AG ¶ 8(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

²⁹ AG ¶¶ 6, 7, and 8 (setting forth the security concern and the disqualifying and mitigating conditions).

³⁰ AG ¶ 6.

individual, group, organization, or government and the interests of the United States; and

AG ¶ 8(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 United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest.

The ongoing turmoil and instability in Afghanistan and the heightened risk it creates place a heavy burden on Applicant to show his family ties to Afghanistan are mitigated. The evidence shows he has relatively strong family ties. The best evidence on this point is (1) his immediate family (wife, mother, siblings) are all natives of Afghanistan, and (2) his wife's immediate family (mother, father, and siblings) are citizens of and residents in Afghanistan, which is imputed to Applicant via his marriage. With that said, I have no concern about his wife, mother, and siblings who no longer live in Afghanistan and now live in the United States. Likewise, I have no concern about his annual charitable contribution by sending money to Afghanistan, because it is done as an act of religious faith as opposed to family ties. And I have no concern about his irregular and infrequent contact with two cousins in Afghanistan. Considering the evidence as a whole, including his wife's regular contact her immediate family in Afghanistan, I cannot conclude that it is unlikely that Applicant would be placed in a position of compromise or conflict in a security context. The situation in Afghanistan is too uncertain and unstable to reach that conclusion. This is especially true considering Applicant is seeking a security clearance to allow him to work as a linguist in Afghanistan. Accordingly, the foreign influence concern is not mitigated under AG ¶¶ 8(a) and (b).

Following *Egan* and the clearly-consistent standard, the evidence leaves me with doubt about Applicant's suitability for a security clearance. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. Indeed, Applicant presented a good deal of evidence that is quite favorable, including the testimony of three character witnesses and evidence of his good employment record. I also gave due consideration to the whole-person concept.³¹ Having done so, I conclude that Applicant has not met his ultimate burden of persuasion to obtain a favorable clearance decision.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline B:	Against Applicant
Subparagraph 1.a:	For Applicant

³¹ AG ¶ 2(a)(1)-(9).

Subparagraphs 1.b–1.d:	Against Applicant
Subparagraphs 1.e–1.h:	For Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraphs 2.a–2.c:	For Applicant
Subparagraphs 2.d–2.g:	Against Applicant
Paragraph 3, Guideline F:	For Applicant
Subparagraph 3.a	For Applicant

Conclusion

In light of the record as a whole, 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.

Michael H. Leonard
Administrative Judge