DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 11-01920
	)	
Applicant for Security Clearance	)	

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

September 27, 2011

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline B, Foreign Influence. Applicant's eligibility for a security clearance is denied.

Statement of the Case

On April 22, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline B, Foreign Influence.[1] 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), effective within the Department of Defense on September 1, 2006.

[1] The SOR referred to the previous Directive language as it listed the concern under Guideline B. My analysis was based upon the current concern language as stated in the AG dated September 1, 2006.

Applicant answered the SOR on May 11, 2011, and elected to have his case decided on the written record. Department Counsel submitted the Government's File of Relevant Material (FORM) on June 24, 2011. The FORM was mailed to Applicant and he received it on July 15, 2011. Applicant was given an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant responded in writing on July 16, 2011. The case was assigned to me on August 3, 2011.

Procedural Ruling

Department Counsel requested administrative notice of facts concerning the Pakistan.[2] Department Counsel provided supporting documents that verify detail and provide context for these facts in the Administrative Notice request. *See* the Pakistan section of the Findings of Fact of this decision, *infra*, for the material facts from Department Counsel's submissions on Pakistan.

Administrative or official notice is the appropriate type of notice used for administrative proceedings.[3] Usually administrative notice in ISCR proceedings is accorded to facts that are either well known or from government reports.[4]

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations. Those admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 60 years old. He was born in Lahore, Pakistan and became a United States naturalized citizen on November 16, 2001. He is not married, having been divorced in June 1987. His former wife lives in Canada. He has one daughter who is 30 years old. He is president of his own consulting firm and is seeking a security clearance through a defense contractor for whom he consults. He has never held a security clearance. He holds a doctorate degree. He has no history of military service.[5]

Applicant came to the United States in 1980 to further his education. He did this by attaining both a master's degree and a Ph.D. He stayed in this country and worked in the private sector. In 1995, he was granted permanent residence status. He has been the owner and president of his consulting business since 1999. Since becoming a

[2] FORM p. 3.

[3] *See* ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004) and *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)).

[4] *See* Stein, *Administrative Law*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice).

[5] Item 5.

citizen in 2001, he has voted in state and national elections and appeared for jury duty on two occasions. He is also involved with various community service activities. His daughter, son-in-law, and two granddaughters all live in the United States.[6]

Applicant has the following relatives who are residents and citizens of Pakistan:

1. One brother who lives in Lahore and is a physician in private practice. He is 66 years old. Applicant has contact with his brother by telephone about twice a year.

2. One sister living in Islamabad who is a housewife. She is 63 years old. Applicant has contact with her by telephone about once a month.

3. Two step-sisters, one lives in Lahore and one in Karachi. They are both housewives. One step-sister is 82 years old and the other is 67. Applicant has telephone contact with them about once every year or two.

4. One brother-in-law who is a retired brigadier general in the Pakistan Army. He is 70 years old. He retired from the military in the mid-1990s.

Applicant visited Pakistan in 2005 and 2007. He visited family and friends during his trips.[7]

Pakistan

Pakistan is a parliamentary federal republic with a population of more than 167 million people. After September 11, 2001, Pakistan supported the United States and an international coalition in Operation Enduring Freedom to remove the Taliban from power. Despite this support, members of the Taliban are known to be in the Federally Administered Tribal Areas (FATA) of Pakistan and in the Balochistan Province, which borders Iran and Afghanistan. The leader of the Taliban operates openly in Pakistan, as are extremists from the Pakistani Taliban and Al Qaida. Taliban financing has been traced from Pakistan to Afghanistan, allowing the insurgency in Afghanistan to strengthen its military and technical capabilities. Pakistan has intensified its counterinsurgency efforts, but its record for dealing with militants has been mixed.

The U.S. Department of State has defined several areas of Pakistan to be terrorist safe havens. The security situation in Afghanistan worsened in 2008, driven in part by insurgent access to safe havens in western Pakistan through the porous Afghan-Pakistan border. In early 2009, the FATA in Pakistan continued to provide vital sanctuary to Al Qaida and a number of foreign and Pakistan-based extremist groups. Al-Qaida exploits the permissive operating environment to support the Afghan insurgency, while also planning attacks against the United States and Western interests

[6] Applicant's Response to FORM, dated July 16, 2011 (AR).

[7] AR; Items 4, 6, 7.

in Pakistan and worldwide. Together with the Afghan Taliban and other extremists groups, Al Qaida uses this sanctuary to train and recruit operatives, plan and prepare regional and transnational attacks, disseminate propaganda, and obtain equipment and supplies. Al Qaida and its extremists have waged a campaign of destabilizing suicide attacks throughout Pakistan. The attacks targeted high-profile government, military, and western-related sites. Nearly 1,000 individuals were killed in 2008 due to such attacks. In the last three months of 2009, terrorists based in Pakistan conducted at least 40 suicide terrorist attacks in major cities of Pakistan and killed about 600 Pakistani civilians and security force personnel.

The U.S. State Department warns U.S. citizens of the risks of traveling to Pakistan in light of terrorist activity. Since 2007, several American citizens present in Pakistan have been kidnapped for ransom or other personal reasons. The human rights situation in Pakistan remains poor. Extrajudicial killings, torture, and disappearances occur. Arbitrary arrests, governmental and police corruption is widespread, and the Pakistani government maintains several domestic intelligence agencies to monitor politicians, political activists, suspected terrorists, the media, and suspected foreign intelligence agents. Credible reports indicate that authorities use wiretaps and monitor mail without the requisite court approval, and also monitor phones and electronic messages. In addition, Pakistan continues to develop its own nuclear infrastructure, expand nuclear weapon stockpiles, and seek more advanced warhead and delivery systems. In the aftermath of Pakistan's development of nuclear weapons, the United States cut off military aid to Pakistan for several years.

After September 11, 2001, Pakistan pledged its alliance with the United States in counterterrorism methods. Pakistan committed to elimination of terrorist camps on the Pakistan-Afghanistan border and subsequently sent thousands of troops and sustained hundreds of casualties in this effort. Overall, Pakistan has intensified counterinsurgency efforts, and demonstrated determination and persistence in combating militants. The United States is engaging in a substantial effort to bolster Pakistan's military forces and security. In 2003, President Bush announced that the United States would provide Pakistan with $3 billion in economic and military aid over the next five years beginning in 2005. On May 1, 2011, U.S. Special Forces personnel raided a large al-Qa'ida compound located in Pakistan where they found and killed Osama bin Laden, the leader of al-Qa'ida. He was found in a residential neighborhood in Pakistan.

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 are used 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 national 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, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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 that an 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.

Section 7 of Executive Order 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

Foreign Influence

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

> 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.

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

> (a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion; and
>
> (b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information.

AG ¶¶ 7(a) and 7(b) apply because of Applicant's relationships with his brother, sister, step-sisters, and brother-in-law, who are living in Pakistan. Applicant was born in Pakistan.

Applicant communicates with his sister on a monthly basis. His contacts with his other relatives are not as frequent; however, there is a rebuttable presumption that a person has ties of affection for, or obligation to, their immediate family members. Applicant has not attempted to rebut this presumption. Applicant's relationships with his relatives living in Pakistan are sufficient to create "a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion." His relationships with residents of Pakistan create a concern about Applicant's "obligation to protect sensitive information or technology" and his desire to help his relatives who are in Pakistan. For example, if the Pakistan Government or terrorists in Pakistan wanted to expose Applicant to coercion, it could exert pressure on his brother, sister, step-sisters, or brother-in-law. Applicant would then be subject to indirect coercion through his relationship with his relatives and classified information could potentially be compromised.

The mere possession of close family ties with a family member living in Pakistan is not, as a matter of law, disqualifying under Guideline B. However, if an applicant has a close relationship with even one relative living in a foreign country, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information.

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 Pakistan with the United States places a significant, but not insurmountable burden of persuasion on Applicant to demonstrate that his relationships with his relatives living in Pakistan 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 Pakistan who might be coerced by terrorists or other Governmental entities in Pakistan.

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."[8] Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields.

While there is no evidence that intelligence operatives or terrorists from Pakistan seek or have sought classified or economic information from or through Applicant, or his relatives living in Pakistan, it is not possible to rule out such a possibility in the future. Although Applicant's communications with his relatives, other than his sister, living in Pakistan are infrequent, he continues to feel an obligation to them and affection for them. Applicant's concern for his relatives is a positive character trait that increases his trustworthiness; however, it also increases the concern about potential foreign influence. Department Counsel produced substantial evidence to raise the issue of potential foreign pressure or attempted exploitation. AG ¶¶ 7(a) and 7(b) apply, and further inquiry is necessary about potential application of any mitigating conditions.

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

> (a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;
>
> (b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;

[8] ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

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

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

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country; and

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

AG ¶¶ 8(a), 8(b), 8(c), and 8(f) have limited applicability. Applicant traveled to Pakistan in 2005 and 2007. Applicant has limited contact with his relatives, other than his sister, who live in Pakistan. The amount of contacts between an Applicant and relatives living in a foreign country is not the only test for determining whether someone could be coerced through their relatives. Because of his connections to his brother, sister, step-sisters, and brother-in-law, Applicant is not able to fully meet his burden of showing there is "little likelihood that he could create a risk for foreign influence or exploitation." It is evidence that he feels an obligation to his relatives' welfare.

Applicant has "deep and longstanding relationships and loyalties in the U.S." He has strong family connections to the United States. His daughter and grandchildren live in the United States. Applicant also owns a business in the United States.

Applicant's relationships in the United States must be weighed against the potential conflict of interest created by his relationships with his relatives who live in Pakistan. There is no evidence that terrorists, criminals, the Pakistan Government, or those conducting espionage have approached or threatened Applicant or his relatives in Pakistan to coerce Applicant or his relatives for classified or sensitive information. Applicant has not yet received access to classified information and as such, there is a reduced possibility that Applicant or Applicant's family would be specifically selected as targets for improper coercion or exploitation. While the Government does not have any burden to prove the presence of such evidence, if such record evidence was present, Applicant would have a heavy evidentiary burden to overcome to mitigate foreign influence security concerns. It is important to be mindful of the United States' recent relationship with Pakistan, and especially Pakistan's systematic human rights violations and most of the ever present danger from terrorists and those who seek to damage U.S interests. The conduct of terrorists in Pakistan makes it more likely that terrorists would attempt to coerce Applicant through his relatives living in Pakistan, if the terrorists determined it was advantageous to do so.

AG ¶¶ 8(d) and 8(e) do not apply. The U.S. Government has not encouraged Applicant's involvement with his relatives living in Pakistan. Applicant is not required to report his contacts with his relatives living in Pakistan.

AG ¶ 8(f) has some applicability. Applicant has substantial property interests in the United States, which include his employment in the United States, and the value of his business in the United States. However, this mitigating condition can only fully mitigate security concerns raised under AG ¶ 7(e), which is not raised in this case. Applicant does not own any property or have any investments in Pakistan or elsewhere outside the United States.

In sum, the primary security concern is Applicant's relationships with his relatives, who live in Pakistan. These relatives are readily available for coercion. Although the Pakistan Government's failure to follow the rule of law further increases the risk of coercion, the major cause of concern is the prevalence of terrorists in Pakistan.

Whole-Person Concept

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

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

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. The circumstances tending to support denial of Applicant's clearance are more significant than the factors weighing towards approval of his clearance at this time. Applicant's relatives live in Pakistan. Terrorists have killed hundreds of Pakistani citizens in the last two years, and would not hesitate to coerce Applicant through his relatives to obtain classified information. Therefore, he failed to provide sufficient evidence to mitigate the security concerns.

Overall the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline B, Foreign Influence.

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:	AGAINST APPLICANT
Subparagraphs 1.a – 1.d:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, 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.

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Robert E. Coacher
Administrative Judge