



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



In the matter of:)
)
) ISCR Case No. 11-06078
)
Applicant for Security Clearance)

Appearances

For Government: Pamela Benson, Esq., Department Counsel
For Applicant: *Pro se*

09/07/2012

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 February 14, 2012, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline B, foreign influence. 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.

Applicant answered the SOR on April 8, 2012, and elected to have his case decided on the written record. Department Counsel submitted the Government's File of

Relevant Material (FORM) on June 19, 2012. The FORM was mailed to Applicant and he received it on July 4, 2012. Applicant was given an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant responded in writing on July 18, 2012. The case was assigned to me on August 24, 2012.

Procedural Ruling

Department Counsel requested administrative notice of facts concerning the country of Afghanistan.¹ Department Counsel provided supporting documents that verify, detail, and provide context for these facts in the Administrative Notice request. See the Afghanistan section of the Findings of Fact of this decision, *infra*, for the material facts from Department Counsel's submissions on Afghanistan.

Administrative or official notice is the appropriate type of notice used for administrative proceedings.² Usually administrative notice in ISCR proceedings is accorded to facts that are either well known or from government reports.³

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations. Those admissions are incorporated into the findings of fact. Additionally, because Applicant chose to have this matter handled administratively, his demeanor or appearance cannot be evaluated, nor can I make a positive determination concerning his truthfulness, sincerity, honesty, or openness. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 41 years old. He was born in Ghazni, Afghanistan and became a United States naturalized citizen on January 8, 2007. He is married and his wife is a citizen of Azerbaijan and a resident alien of the United States. His three children, ages 24, 22, and 14, are all citizens of Azerbaijan and resident aliens of the United States. He has never held a security clearance. He has no history of military service in the U.S. military.⁴

Applicant was a helicopter pilot in the Afghanistan Air Force from December 1989 to June 1993. He was trained at a foreign military academy inside the former Soviet Union from 1986 to 1989. After the Afghanistan government collapsed, the

¹ FORM p. 5-11.

² 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)).

³ See Stein, *Administrative Law*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice).

⁴ Items 5, 7.

military functions were split amongst the Mujahedeen. He served with two militia groups. He was deployed by the later group to Azerbaijan from July 1993 to November 1995 to assist with a conflict with a neighboring country. He sought citizenship in Azerbaijan, but was unsuccessful in gaining it. His military service ended in 1995. He was employed as a tradesman in Azerbaijan. He achieved refugee status and traveled to the United States in March 2001. His father was a logistics officer in the Afghanistan Army from 1960 to 1978. He was kidnapped and killed by the Afghanistan communist government in 1978.⁵

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

1. Two brothers who live in Kabul. One is journalist with a television network and the other is a linguist for the U.S. Army. He has contact with his brothers about three times per month.

2. Four sisters who live in Kabul. Three are housewives who he has contact with about five times per year. The fourth sister works as database administrator for the Afghanistan Parliament. He has contact with her monthly.

3. Three brothers-in-law, two of which live in Kabul and one who lives in Kandahar. All three are in the Afghanistan Army. He has contact with them about twice a year.

Applicant's father-in-law and three sisters-in-law are citizens and residents of the Republic of Azerbaijan. His father-in-law is a retired welder who he has contact with about three times a year. He has no contact with his sisters-in-law.

Applicant has four sisters-in-law who are citizens and residents of Russia. He has no contact with them.⁶

Afghanistan

Formerly under the control of the United Kingdom, Afghanistan received independence in August 1919. It is a rugged and mountainous country in Southwestern Asia, approximately the size of Texas, and has common borders with Pakistan on the east and the south, Iran on the west, and Russia on the north. In 2009, the population was about 28 million people. Afghanistan has had a turbulent political history, including an invasion by the Soviet Union in 1979, occupation by the Soviet Union until 1989, and civil war between the occupiers and home-grown freedom fighters, known as Mujahidin. Anarchy ensued, and fighting continued among the various ethnic, clan, and religious warlords and their respective militias even after the Soviet Union withdrew from the

⁵ Item 3, 7.

⁶ Items 5-8.

country. By the mid-1990s, the Taliban rose to power and controlled significant portions of the country, imposing repressive policies and sharia law, guiding all aspects of Muslim life. Afghanistan became a sanctuary for terrorist groups.

After the September 11, 2001 terrorist attacks in the United States, U.S. demands that Afghanistan expel Osama Bin-Laden and his followers were rejected by the Taliban. In October 2001, U.S. forces and coalition partners led military operations in the country, forcing the Taliban out of power. Following a few years of governance by an interim government, a democratic presidential election took place in October 2004, and a new democratic government took power. Despite the election, many daunting challenges remained largely because terrorists including al-Qaida and the Taliban continue to assert power and intimidation within the country. Terrorists continue to target United States and Afghan interests through suicide bombings, assassinations, and hostage taking.

Afghanistan's human rights record remains poor, for there are continuing extrajudicial killings; torture and other abuse; widespread official corruption and impunity; ineffective government investigations of abuses by local security forces; arbitrary arrest and detention; judicial corruption; violations of privacy rights; violence and societal discrimination against women; sexual abuse of children; trafficking in persons; and restrictions on freedoms of religion, the press, assembly, and movement.

Taliban insurgents retain the capability and intent to conduct attacks and kidnappings of Americans, other Western nationals, and members of the local populace. The U.S. has made a long-term commitment to help Afghanistan rebuild itself after decades of war, and along with others in the international community, provides substantial assistance, focusing on reintegration, economic development, improving relations with Afghanistan regional partners, and steadily increasing the security responsibilities of the Afghan security forces. Furthermore, there is increased terrorist support coming into Afghanistan from Pakistan and Iran. Nevertheless, while the security situation remains volatile and unpredictable throughout Afghanistan, there are tensions between the U.S. and Afghanistan over limiting U.S. military operations.⁷

No evidence was offered, or request to take administrative notice submitted, concerning the countries of Russia or Azerbaijan.

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.

⁷ Administrative notice documents I-VI.

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 brothers, sisters, and brothers-in-law, who are living in Afghanistan. Applicant was born in Afghanistan and served in the Afghanistan military as a helicopter pilot for an extended period of time. He also was a member of two militia groups in Afghanistan and Azerbaijan. Since no evidence was offered by the Government concerning the countries of Russia and Azerbaijan, I cannot determine whether a heightened risk exists or whether a conflict of interest exists concerning the relatives located in Russia and Azerbaijan. Therefore, the Government did not meet its initial burden regarding these allegations (SOR ¶¶ 1.h, 1.j – 1.l)

Applicant communicates with his siblings on a regular basis. 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 Afghanistan are sufficient to create "a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion." Moreover, this former military affiliation with Afghanistan and two militia groups operating in Afghanistan and his desire to help his relatives who are in Afghanistan create a concern about Applicant's "obligation to protect sensitive information or technology". For example, if the Afghanistan Government or insurgents in Afghanistan wanted to expose Applicant to coercion, it could exert pressure on his brothers, sisters, or brothers-in-law. Applicant would then be subject to 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 Afghanistan 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 Afghanistan 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 Afghanistan do not pose a security risk. Applicant should not be placed in a position where he might be forced to choose between loyalty to the United States and a desire to assist his relatives living in Afghanistan who might be coerced by terrorists or other Governmental entities in Afghanistan.

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 Afghanistan seek or have sought classified or economic information from or through Applicant, or his relatives living in Afghanistan, it is not possible to rule out such a possibility in the future. Although Applicant's communications with his relatives living in Afghanistan are sporadic, 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

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

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;

(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) and 8(c) have limited applicability. Applicant's military background is something that could be exploited against him. Applicant has limited contact with his relatives who live in Afghanistan. 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 brothers, sisters, one of whom works for the Afghanistan Government, and brothers-in-law, who are currently serving in the Afghanistan military, Applicant is not able to fully meet his burden of showing there is "little likelihood that it could create a risk for foreign influence or exploitation."

Applicant does not have "deep and longstanding relationships and loyalties in the U.S." He has only been a citizen since 2007 and his wife and children are not citizens of the United States. AG ¶ 8(b) does not apply.

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 Afghanistan. There is no evidence that insurgents, criminals, the Afghanistan Government, or those conducting espionage have approached or threatened Applicant or his relatives in Afghanistan 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 Afghanistan and especially the ever present danger from insurgents and those who seek to damage U.S interests. The conduct of insurgents in Afghanistan makes it more likely that insurgents would attempt to coerce Applicant through his relatives living in Afghanistan, if the insurgents determined it was advantageous to do so.

AG ¶ 8(d) does not apply. Applicant's involvement with his relatives living in Afghanistan is not on U.S. Government business or approved by a cognizant security authority. Applicant is not required to report his contacts with his relatives living in Afghanistan.

AG ¶ 8(e) does not apply because it is not relevant to the facts of this case.

AG ¶ 8(f) does not apply. Applicant has some property interests in the United States, which include his employment 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 Afghanistan or elsewhere outside the United States.

In sum, the primary security concern is Applicant's relationships with his relatives, who live in Afghanistan and his past involvement with the Afghanistan military and militia groups. These relatives are readily available for coercion. Although the Afghanistan Government's poor human rights record further increases the risk of coercion, the major cause of concern is the prevalence of insurgents in Afghanistan and the control they exert on Applicant through his relatives living there.

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 Afghanistan. Insurgents continue to target Afghanistan and United States' interests, 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.g:	Against Applicant
Subparagraph 1.h:	For Applicant
Subparagraph 1.i:	Against Applicant
Subparagraphs 1.j – 1.l:	For 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.

Robert E. Coacher
Administrative Judge