



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



In the matter of:)	
)	
)	ISCR Case No. 11-06939
)	
)	
Applicant for Security Clearance)	

Appearances

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

08/02/2013

Decision

LYNCH, Noreen A., Administrative Judge:

On January 8, 2013, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance, citing security concerns under Guideline B (Foreign Influence) and Guideline F (Financial Considerations). The action was taken 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 in September 2006.

Applicant received the SOR and requested an administrative determination in lieu of a hearing. Department Counsel submitted a File of Relevant Material (FORM), dated May 2, 2013. Applicant received the FORM on June 5, 2013.¹ He did not submit any additional information. The case was assigned to me on July 25, 2013. Based on a review of the file, I find Applicant has not mitigated the security concerns raised under

¹The Government submitted nine items in support of its case.

Guideline B. The Government did not submit any evidence with regard to the one debt alleged under Guideline F, and conceded the security concern has been mitigated. (Item 4) Eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Department Counsel requested that I take administrative notice of certain facts relating to Afghanistan. The request and the attached documents are included in the record file. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegations under Guideline B in ¶¶ 1.a, 1.c-1.e. He denied SOR 1.b and he denied the allegation under Financial Considerations in ¶ 2.a. His admissions are incorporated in my findings of fact. I make the following findings:

Applicant is 43 years old and was born in Afghanistan. He came to the United States in 1996, and became a naturalized U.S. citizen in July 2005. In 1987, Applicant married his wife who was born in Afghanistan. She became a permanent resident in August 2009. As a result of the marriage, they have three children. Two are permanent residents and one is a U.S. citizen.²

Applicant is an employee of a defense contractor and is currently deployed to Afghanistan working with U.S. Armed Forces as a contract linguist. He submitted a security clearance application on January 8, 2009. (Item 7) Applicant's security clearance application notes that he has had applied for a security clearance in 2006 while working in Afghanistan. (Item 7)

The SOR alleges security concerns based on Applicant's family in Afghanistan. His mother, father, four brothers and three sisters are citizens and residents of Afghanistan. His father-in-law is a citizen and resident of Afghanistan. The SOR further alleges that Applicant's three children are citizens and resident of Afghanistan.

Applicant admits that his mother and father are citizens and residents of Afghanistan. However, In official government documents in the file, Applicant's father is listed as now deceased. Applicant outlined the extent of his contacts with his family in Afghanistan. His mother is a homemaker and his four brothers are employed as farmers. His three sisters are homemakers and his father-in-law is a retired farmer. Applicant has frequent contacts with all of his first-line family. Contact with his brothers is frequent, at "once a month," his sisters once every two months, and father-in-law once every five

²The file contains a U.S. citizenship certificate for one child that notes entry into the U.S. as August 6, 2009, which is the same date as Applicant's spouse and other children. Applicant denied the allegation relating to his children and spouse.

months. (Item 8) Applicant has traveled to Afghanistan and during these visits he sees family members. (Item 9)

There is no evidence in the record that Applicant breached any security policies or procedures while in Afghanistan.

Administrative Notice

I take administrative notice of the following facts about Afghanistan, including the fact that Afghanistan has been an independent nation since August 19, 1919, after the British relinquished control. A monarch ruled from 1919 until a military coup in 1973. Following a Soviet-supported coup in 1978, a Marxist government emerged. In December 1979, Soviet forces invaded and occupied Afghanistan. Afghan freedom fighters, known as mujaheddin, opposed the communist regime. The resistance movement eventually led to an agreement known as the Geneva Accords, signed by Pakistan, Afghanistan, the United States, and the Soviet Union which ensured Soviet forces withdrew by February 1989.

The mujaheddin were not a party to the negotiations for the Accords and refused to accept them. As a result, civil war continued after the Soviet withdrawal. In the mid 1990s, the Taliban rose to power largely due to the anarchy and warlordism that arose after the Soviet withdrawal. The Taliban sought to impose an extreme interpretation of Islam on the entire country and committed massive human rights violations. The Taliban also provided sanctuary to Osama Bin Laden, Al Qa'ida, and other terrorist organizations.

After the September 11, 2001 terrorist attacks, demands to expel Bin Laden and his followers were rejected by the Taliban. U.S. forces and a coalition partnership commenced military operations in October 2001 that forced the Taliban out of power by November 2001. A new democratic government took power in 2004. Despite progress made since the Taliban was deposed, Afghanistan still faces many daunting challenges. Among these challenges are defeating terrorists and insurgents, recovering from over three decades of civil strife, and rebuilding a shattered physical, economic, and political infrastructure.

The Taliban, Al-Qa'ida, other insurgent groups, and anti-Coalition organizations continue to operate in Afghanistan, resulting in numerous attacks and deaths. Insurgents have targeted non-governmental organizations (NGOs), Afghan journalists, government workers, and UN workers. Instability along the Pakistan-Afghan frontier continued to provide al-Qa'ida with leadership mobility and the ability to conduct training and operational planning, targeting Western Europe and U.S. interests in particular. Kabul, in particular, has seen a rise in militant attacks, including rocket attacks, vehicle borne improvised explosive devices (IEDs), and suicide bombings.

At this time, the risk of terrorist activities remains extremely high. The country's human rights record remains poor and violence is rampant. According to recent reports

from the U.S. Department of State, insurgents continue to plan attacks and kidnappings of Americans and other Western nationals. Travel warnings are ongoing. Overall, the State Department has declared that the security threat to all American citizens in Afghanistan remains critical as no part of Afghanistan is immune from violence.

The United States supports the efforts of the Afghan Government to establish a vibrant civil society, one that emphasizes democratic principles through a rule of law and creates accountable and transparent forms of government. The United States and its international partners remain committed to helping Afghans realize their vision for a country that is stable, democratic, and economically successful, and to an Afghan Government committed to the protection of women's rights, human rights, and religious tolerance.

On May 2, 2012, the United States and Afghanistan signed the *Enduring Strategic Partnership Agreement between the Islamic Republic of Afghanistan and the United States of America*, a 10-year-strategic partnership agreement (SPA) that demonstrates the United States' enduring commitment to strengthen Afghanistan's sovereignty, stability, and prosperity and continue cooperation to defeat al-Qaida and its affiliates.

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 occupy a position . . . that will give that person 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 and modified.

Eligibility for a security clearance is predicated upon an applicant meeting the criteria contained in the adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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 an applicant may deliberately or inadvertently fail to protect classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of an applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination of the loyalty of an applicant. It 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 an 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. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to an applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. 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 security concern under Guideline B is set out in AG ¶ 6 as follows:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

A disqualifying condition may be raised by “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.” AG ¶ 7(a). A disqualifying condition

also may be raised by “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(b).

Applicant admits that his mother, sisters, brothers and father-in-law are citizens and residents of Afghanistan. Applicant has frequent contact with them. It appears that his father is now deceased and his wife and children are either permanent residents or U.S. citizens. However, under either disqualifying condition, security concerns could arise in connection with the potential that hostile forces might seek protected information from Applicant by threatening harm to his family members in Afghanistan. Based on this evidence, AG ¶¶ 7(a) and (b) are raised.

Since the Government produced evidence to raise the disqualifying conditions in AG ¶¶ 7(a) and (b), the burden shifted to Applicant to produce evidence 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).

Applicant in his answer offers his views concerning Guideline B and its application to family members possibly creating a security concern. Specifically, he asserts that, “such assertion creates an unreasonable application thereof by selective enforcement of DoD Directive 5220.6 as it pertains to a Class of Foreign Nationals from Afghanistan.” (Item 4) Additionally, Applicant states regarding Guideline B case, “Put to more simple terms, if this ground for denial of a security clearance is equally applied to the class as a whole under the guise of National Security, then certainly in this class of employ, there should be no person of Afghani or Iraqi descent who has any relatives in Iraq or Afghanistan to have any final security determination other than “DENIED.”

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, 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. See ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). 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, the country is known to

conduct intelligence operations against the United States, or the foreign country is associated with a risk of terrorism.

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). 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). Similarly, 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 U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest.”) does not apply.

Applicant did not present sufficient information to mitigate the security concerns given his relationships and frequency of contact with his relatives in Afghanistan. His work as a linguist supporting the U.S. military in Afghanistan is laudable. The record shows that he worked in Afghanistan from 2006 until 2008.

The new Afghanistan government relies upon the United States for support, both financially and militarily, as it moves forward with a new form of government. While Afghanistan’s human rights record under the Taliban was dismal and serious problems continue, its human rights record is slowly improving. Applicant has worked as an interpreter with the U.S. military for a number of years.

In every case where a family member lives overseas, there is a risk of pressure on this relative and through them upon the holder of a security clearance. Under the facts of this case, a heightened risk for exploitation, inducement, manipulation, pressure, or coercion is substantial. Applicant has not presented detailed or sufficient information in this record to meet his burden to mitigate the security concern.

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 the 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.

The Appeal Board requires the whole-person analysis address “evidence of an applicant’s personal loyalties; the nature and extent of an applicant’s family ties to the U.S. relative to his or her ties to a foreign country; his or her social ties within the U.S.; and, many others raised by the facts of a given case.” ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007).

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Certain circumstances weigh against Applicant in the whole-person analysis. First, Applicant’s mother, sisters, brothers, and his father-in-law live in Afghanistan. Terrorists or agents of the Taliban could attempt to use Applicant’s family or others to obtain information. These connections raise the possibility of foreign influence. The connection is not minimal in this case. Applicant’s wife became a permanent resident of the U.S. in 2009, but Applicant did not submit recent formation concerning U.S. citizenship. It appears that one child is a U.S. citizen and two are permanent residents. Applicant did not supplement the record to submit sufficient mitigating information.

A Guideline B decision concerning Afghanistan must take into consideration the geopolitical situation and dangers there. Afghanistan is a dangerous place because of the violence from the Taliban and terrorists. The Taliban and terrorists continue to threaten the Afghan Government, the interests of the United States, U.S. Armed Forces, and those who cooperate with and assist the United States. The United States and Afghanistan are allies in the war on terrorism. The United States is committed to the establishment of a free and independent Afghan Government. Afghanistan and the United States have close relationships in diplomacy and trade.

Substantial mitigating evidence is lacking in favor of granting Applicant a security clearance, despite the fact that he is a naturalized U.S. citizen and has served the U.S. Army as a linguist in Afghanistan.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances in the context of the whole person, I conclude Applicant has not mitigated the security concerns pertaining to foreign influence. The complicated state of affairs in Afghanistan places a significant burden on Applicant to demonstrate that his foreign family members do not pose an unacceptable security risk. Overall, the record leaves me with questions and doubts as to Applicant’s eligibility and suitability for a security clearance.

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25 of Enclosure 3:

Paragraph 1, Foreign Influence:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraphs 1.c-e:	Against Applicant
Paragraph 2, Financial	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.

Noreen A. Lynch
Administrative Judge