



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



In the matter of:)
)
) ISCR Case No. 15-07070
)
Applicant for Security Clearance)

Appearances

For Government: Andrea Corrales, Esq., Department Counsel
For Applicant: *Pro se*

02/23/2018

Decision

KILMARTIN, Robert J., Administrative Judge:

Applicant failed to mitigate foreign influence security concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on February 9, 2015. On June 17, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline B, foreign influence, and Guideline C, foreign preference. The DOD CAF acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AGs) implemented by DOD on September 1, 2006.

On December 10, 2016, the Director of National Intelligence signed Security Executive Agent Directive 4 (SEAD 4), implementing new AGs effective within the DOD on June 8, 2017. Accordingly, I have applied the June 8, 2017 AGs in this decision.¹

Applicant answered the SOR on July 12, 2016, admitting all of the SOR allegations except for the allegations in SOR ¶ 1.e and ¶ 2.a, which he denied. Applicant also requested a hearing before an administrative judge. The case was assigned to me on July 20, 2017. The Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for February 15, 2018. I convened the hearing as scheduled.

Government Exhibits (GE) 1 and 2 were admitted into evidence without objection. At the hearing, Applicant testified, and requested that I leave the record open for additional supplemental documentation. I left the record open until March 1, 2018, (Tr. 22, 47, 79, 80) and he submitted Applicant's Exhibit (AE) A, a character reference letter, which was admitted without objection. DOHA received the transcript (Tr.) on February 26, 2018. At the hearing, department counsel moved to withdraw the Guideline C security concerns entirely. This included deleting the allegation in SOR ¶ 2.a and including the allegation that was previously at SOR ¶ 2.b under Guideline B, and renumbering it as SOR ¶ 1.f. The newly added SOR ¶ 1.f alleges, "you owned an advertising business in Iraq from approximately November 2013 through January 2015. This motion was granted. (Tr. 11-12) It did not alter Applicant's admission of this allegation.

Request for Administrative Notice

Department Counsel submitted a written request that I take administrative notice of certain facts about Iraq. The request and the attached source documents were not admitted into evidence but were included in the record as Hearing Exhibit (HE 1).

The request listed supporting documents to show detail and context for those facts. AG ¶ 6, Foreign Influence, provides, "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 risk assessment in this case necessitates administrative notice of facts concerning Iraq.

Administrative or official notice is the appropriate type of notice used for administrative proceedings. 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)). Usually administrative notice at ISCR

¹ Although I have decided this case under the adjudicative guidelines (AG) effective June 8, 2017, I also considered the case under the former AG effective on September 1, 2006, and my decision would be the same under either AG.

proceedings is accorded to facts that are either well known or from government reports. See Stein, ADMINISTRATIVE LAW, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice).

Applicant did not object, and I have taken administrative notice of the facts contained in the HE 1 source documents, and incorporated them by reference. The facts are summarized in the written request and will not be repeated in this decision. However, of particular note, are the following salient facts from HE 1:

Iraq is a constitutional parliamentary republic. The U.S. State Department warns that U.S. citizens traveling in Iraq remain at high risk for kidnapping and terrorist violence and to avoid all but essential travel to Iraq. The Islamic State of Iraq and the Levant (ISIL) controls a significant portion of Iraq's territory. Within areas under ISIL control, the Iraq government has little or no ability to exercise control and ensure public safety. Kidnappings and attacks by improvised explosive devices (IED's) occur frequently in many areas of the country, including Baghdad. Such attacks often take place in public venues such as cafes and markets.

Anti-U.S. sectarian militias threaten U.S. citizens and western companies throughout Iraq. Iraq witnessed a continuing surge of terrorist activity in 2015, primarily as a result of the actions of ISIL. Although the government of Iraq has made significant progress in its campaign to retake occupied territory from ISIL, there remains a security vacuum in parts of Iraq. The U.S. State Department has also reported that ISIL committed the overwhelming number of significant human rights abuses, including attacks against civilians, especially Shia but also Sunnis who opposed ISIL, and women and children. ISIL members committed acts of violence on a mass scale, including killings by suicide bombings, IED's, execution-style shootings, public beheadings, and other forms of execution. Sectarian hostility, widespread corruption, and lack of transparency at all levels, weakened the Iraq government's authority and worsened effective human rights protections.²

Findings of Fact³

Applicant is 42 years old. He was born in the United Kingdom (UK) and remains a dual citizen of the UK and the United States (U.S.). (GE 2, Tr. 50) He left the UK with his family when he was 3 or 4 years old and moved to Erbil, Iraq. Applicant remains an Iraqi citizen by virtue of birth. (Tr. 52) He came to the U.S. with his family in 1988, and he was naturalized in 1993. (Tr. 57) He graduated from high school in the U.S. in 1994. Applicant enlisted in the U.S. Navy in 1995. (Tr. 19) He testified that he served one year before taking advantage of an early out program designed to allow members to pursue

² HE 1. It is noteworthy that ISIL has had little influence in the Kurdish sector of Iraq as ISIL incursions were recently repulsed by Kurdish and U.S. armed forces in 2015.

³ Unless otherwise stated, the basis for these findings of fact is Applicant's Questionnaire for National Security Positions (SCA) dated February 9, 2015 (GE 1) and the counterintelligence investigation report dated April 6, 2015. (GE 2)

their education. (Tr. 19) He was accepted to enroll at a University in the UK tuition free. (Tr. 20) He claims to have received an administrative discharge but could not recall the characterization of his service.⁴ (Tr. 21) The record was left open until March 1, 2018 specifically so that Applicant could provide a copy of his DD-214, and other supplemental documentation. (Tr. 22, 47, 79) He did not submit the DD-214, but submitted a character reference letter post hearing. (AE A)

Applicant attended four years of college courses at a University in UK from 1996-2000, taking business administration courses, but he did not procure a degree. (Tr. 14) Applicant never married but he does have an 18-month-old son living in Bogota, Columbia, with his mother. (Tr. 17, 22, 23, 48) Applicant has been pending employment as a linguist since January 2015, contingent on obtaining a security clearance. Applicant has worked driving for a private company for over two years. (Tr. 61)

Applicant submitted a Questionnaire for National Security Positions (SCA) on February 9, 2015.⁵ In section 18 of his SCA, he disclosed his parents and one sister are residents of Iraq. He disclosed another sister born in Austria and living in the U.S., and a brother born in Erbil, Iraq, but now a U.S. citizen living in the U.S. (Tr. 30) Applicant claimed his parent's address as the U.S. in his SCA, but testified that they have actually resided in Erbil, Iraq since returning in 2004.⁶ (Tr. 27) His parents live in one house in Erbil, and they have another vacation cabin in the Kurdish sector of Iraq, in addition to the home that they maintain in the U.S. (Tr. 36, 61) The two houses in Iraq are valued at \$550,000 and the house in the U.S. is valued at \$ 600,000. (Tr. 72)

Applicant's parents are dual U.S.–Iraqi citizens and his sister is an Iraqi citizen. His father was chief of staff for Voice of America in the U.S., before moving back to Erbil in 2003. (Tr. 17) He moved back to Erbil to be a senior political advisor to the late President Talibani, with whom he was friends for 60 years. (Tr. 17-18, 68) His father remained in Iraq after the death of President Talibani. Applicant correctly noted that the Kurdish region of Iraq, or KRG, is an autonomous sector of Iraq, and has been a long-term ally of the U.S. in its war on terrorism. (Tr. 13) Although Applicant claims that his father has no remaining affiliation with the Kurdish Regional Government (KRG), his father has a long history of political activity in Iraq dating back to the 1980's when he was targeted by the Saddam Hussein regime due to his political status. (GE 2)

Applicant came back to the U.S. in 2000 for an opportunity at a major corporation. (Tr. 57) He worked there until returning to the Middle East in 2004, and ultimately Iraq. (Tr. 58) He served in Iraq from 2006 – 2008 as part of a U.S. DOD task force for business and stability operations. (Tr. 9) Essentially, this involved using U.S. tax dollars to facilitate business development in Iraq. Applicant last had in-person contact with his sister in Iraq by phone immediately before his hearing. (Tr. 31-33) They

⁴ Applicant listed service in the Navy as six months, from March 1995 to September 1995, in GE 1.

⁵ GE 1.

⁶ Applicant also listed his own address as Erbil, Iraq (parent's home) in his SCA, although he has resided at his parent's house in the U.S. since early 2015.

confer weekly on a social networking application known as “What’s App.” (Tr. 32) Applicant lived with his parents in Erbil, Iraq, continuously from 2007 to 2015, with visits to the U.S. once or twice a year during that time. (Tr. 50) He has telephonic contact with his mother daily, and with his father annually. (Tr. 48, 74) His mother has no affiliation with KRG or the Iraqi Government or intelligence services. She travels back and forth between Iraq and the U.S. to avail herself of U.S. medicine. (Tr. 68) Applicant used his U.S. passport to travel because his UK passport expired years ago. (Tr. 50) Although he has Iraqi and dual U.S. – UK citizenship, he claims undivided loyalty to the U.S. (Tr. 50, 61) Yet, he testified that he will likely return to Iraq if his linguist position does not materialize. (Tr. 77). His only assets in the U.S. are \$4,000 in a U.S. bank account. (Tr. 72)

Applicant admitted the five allegations in the SOR under Guideline B in his July 2016 Answer, but clarified that he lived in Iraq since 2007 vice 2004. He also admitted the amended allegation at SOR ¶ 1.f, that he owned an advertising agency in Iraq from November 2013 to January 2015. He testified that he adopted an advertising strategy he observed in the U.S. by placing paid advertisements on taxicabs and other transportation modes in Iraq. (Tr. 51) He maintained a bank account in Iraq in connection with that business. (Tr. 38) However, he had to close the agency, and the bank account, when the terrorist group Islamic State of Iraq and Syria (ISIS) battled with Kurdish forces in Iraq in 2015. (Tr. 59)

Applicant testified that he is fluent in Kurdish, and speaks some Arabic and Portuguese. (Tr. 40) His English is flawless. He has been waiting approximately three years for the security clearance process with the hope that he can serve the U.S. as a linguist, likely in Syria or the Kurdish region. (Tr. 39) He previously served the U.S. DOD on a task force for business stability operations from roughly 2006 to 2008. (Tr. 41-43) The mission of that task force was to develop business capacity in Iraq by facilitating investment by corporations and creating jobs. In that role, Applicant claims he had an interim security clearance. (Tr. 9, 41) Applicant provided a character reference letter from his supervisor on that task force, attesting to his allegiance to the U.S. (AE A) He maintains friendships and associations from years working in Iraq, mostly via Facebook. (Tr. 71) He stands to inherit the two houses in Iraq with his siblings. (Tr. 72)

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 to be 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, administrative judges apply the guidelines 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 national security eligibility will be resolved in favor of the national security.”

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” The applicant 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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

Guideline B, Foreign Influence

The security concern for foreign influence is set out in AG ¶ 6:

Foreign contacts and interests, including, but not limited to business, financial, and property interests, are a national security concern if they result in divided allegiance. They may also be a national security concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way that is inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United

States citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

The guideline notes several conditions that could raise security concerns under AG ¶ 7. The following are potentially applicable in this case:

(a) contact, regardless of method, 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 classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology;

Applicant's parents are dual citizens, and his sister is a citizen and resident of Iraq. He also has many friends and business associates from his many years working in Iraq. Applicant's foreign contacts create a potential conflict of interest and a heightened risk of foreign exploitation, inducement, manipulation, pressure, and coercion, both directly and through his family members. AG ¶¶ 7(a) and 7(b) are implicated by the evidence. Although the Kurdish population of Iraq has historically been an ally of the United States, the recent political instability in that country and region has become a potential threat to U.S. interests operating there. Accordingly, Applicant's relationship with his parents and sister, who are citizens and residents of Iraq, creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.

Conditions that could potentially mitigate foreign influence security concerns are provided under AG ¶ 8. The following are potentially applicable:

(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 United States;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, or allegiance to the 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; and

(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;

Applicant has demonstrated a long-standing preference for working and living in Iraq and stated his intention to return to Iraq if his economic opportunity to serve as a linguist does not materialize. Indeed, he would work overseas as a linguist if it does materialize. Although he went to high school in the U.S., he left for college in the U.K. after one year or less in the Navy, and he has not demonstrated a long-term commitment to the U.S. He is an economic opportunist. He also has a problem with veracity. His SCA states that he served six months in the Navy. He testified that he served about a year. He was evasive about the circumstances and characterization of his discharge and did not produce his DD-214. He is presumed to have strong bonds of affection with his parents and sister in Iraq. Despite investment of billions of dollars of U.S. tax dollars into that country, it remains corrupt and unstable, and it presents a heightened risk that Applicant's relatives may be manipulated, coerced or exploited to leverage Applicant for classified or sensitive information.

I considered the totality of Applicant's foreign contacts and interests. 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.⁷

The distinctions between friendly and unfriendly governments must be made with caution. Relations between nations can shift, sometimes dramatically and unexpectedly. Furthermore, friendly nations can have profound disagreements with the U.S. 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. The nature of a nation's government, its relationship with the U.S., and its human rights record are relevant in assessing whether 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 U.S., or the foreign country is associated with a risk of terrorism.

Applicant has minimal ties to the U.S. including a transient job as a driver and a small bank account. He has never served as a U.S. linguist, translator, or cultural advisor previously during the conflict in Iraq. He served briefly in the U.S. Navy but produced no evidence that his service was honorable. Such evidence would weigh

⁷ ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

heavily towards approval of his security clearance. See ISCR case No. 07-00034 at 2 (APP. Bd. Feb. 5, 2008)

Applicant lives in his parent's house. His parents are dual citizens, and his sister is a citizen and resident of Iraq, which is an unstable regime. His contact with them is frequent. Although, the KRG sector of Iraq is an anomaly and generally much safer than the rest of Iraq, it is nonetheless susceptible to probing and attempted incursions by ISIL. There is no indication that they are affiliated with the Iraqi government or intelligence services. However, his father has long-standing political connections in Iraq going back to the 1980's. Applicant stands to inherit the properties in Iraq along with his siblings. There are few countries more vulnerable to terrorists than Iraq. Applicant's lack of candor leaves me with doubts about his testimony and evidence. There is insufficient evidence to conclude that Applicant would report contacts with his relatives by foreign intelligence agents, or that he has any long-term commitment to the U.S. None of the mitigating conditions in AG ¶ 8 are applicable to the contacts with family members, which are alleged in SOR ¶¶ 1.a–1.d.

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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. I have incorporated my comments under Guideline B in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline. Applicant is 42 years old. He is a father and he served in Iraq from 2004-2009 on behalf of U.S. DOD in business and stability operations task force. He submitted a post hearing character reference from his former boss for a brief time on that task force, attesting to Applicant's allegiance to the U.S. However, virtually all of his adult work life was spent in Iraq.

Overall, the record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant has not mitigated foreign influence security concerns.

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.f: | Against Applicant |
| Paragraph 2, Guideline C: | Withdrawn |

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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Robert J. Kilmartin
Administrative Judge