



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



In the matter of:)
)
) ISCR Case No. 16-01504
)
Applicant for Security Clearance)

Appearances

For Government: Mary Margaret Foreman, Esq., Department Counsel
For Applicant: Alan Edmunds, Esq.

04/25/2018

Decision

CERVI, Gregg A., Administrative Judge:

Applicant did not mitigate the foreign influence or personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on December 31, 2014. On June 15, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline B (Foreign Influence), and Guideline E (Personal Conduct).¹

Applicant answered the SOR on October 27, 2016, and originally requested a decision based on the administrative record. At Applicant’s request, the case was converted to a hearing before an administrative judge. The case was assigned to me on August 9, 2017.

¹ The DOD CAF acted under Executive Order (Exec. Or.) 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 (AG) implemented by the DOD on September 1, 2006.

The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on October 11, 2017, and the hearing was convened on November 16, 2017. Government Exhibits (GE) 1 through 3 and Applicant's Exhibits (AE) A through E were admitted in evidence. Applicant testified. DOHA received the hearing transcript (Tr.) on December 1, 2017.

Request for Administrative Notice

Department Counsel requested that I take administrative notice of certain facts about Iraq. (HE 1) The facts administratively noticed are summarized in the Findings of Fact, below.

Findings of Fact

Applicant is a 52-year-old employee of a defense contractor. He was born in Iraq in 1965. He received an associate's degree in 1987. He married in 1994 and has three children. He served in the Iraqi Army in 1987 under a mandatory enlistment for one year. He escaped Iraq with his spouse and a child, and entered the United States as a Kurdish refugee in 1996. He naturalized as a U.S. citizen in September 2008. He stated his spouse became a naturalized U.S. citizen in 2008 or 2009. His children are also U.S. citizens. Applicant does not own property in Iraq, nor does he vote in Iraqi elections. He asserted his loyalty and appreciation for the benefits offered by the United States to him and his family. He previously held a security clearance in 2010.

Applicant is a linguist/interpreter for a U.S. government contractor. He has served with U.S. forces in the United States and Iraq. The SOR alleges Applicant's mother, three brothers, two sisters, and two brothers-in-law are citizens and residents of Iraq. It also alleges he sent in excess of \$50,000 to family members in Iraq between 2000 and 2013. Finally, the SOR alleges under Guideline E, that Applicant falsified his 2014 SCA by not reporting his financial support for foreign nationals. Applicant admitted that his family members are citizens and residents of Iraq (SOR ¶¶ 1.a-d), but denied that he sent in excess of \$50,000 to foreign nationals (SOR ¶ 1.e) and that he falsified his SCA (SOR ¶ 2.a).

Applicant completed counter-intelligence security screenings in 2009 and 2014. In the 2009 report, the interviewer noted that Applicant:

sent \$50,000 to his family in Iraq so they could purchase a home in 2008. He sent the money through a cousin that was going to travel to Iraq. He does not maintain regular contact with this cousin, but sought him out to get the money to Iraq.

Applicant also completed a list of relatives and associates, and noted his frequent contact with his mother, sisters, and brothers in Iraq.²

In a second counter-intelligence security screening conducted in 2014, Applicant reported that:

² GE 3, p. 12 and 19.

. . . from 2000 to 2013, he gave “no more than \$200 at one time to friends or family who were travelling to Iraq to take to his family. He stated that he did this approximately three times for a total of less than \$600. He would send this money to help his family with daily life.

He also reported frequent contact with his mother, sisters, brothers, and brothers-in-law in Iraq.³

Applicant noted in his 2014 SCA, that he had never provided financial support for any foreign national. He also noted that he had no close and/or continuing contact with a foreign national within the last seven years with whom he or his spouse are bound by affection. With reference to contacts with his relatives, he noted weekly contact with his mother, and monthly contact with his brothers and sisters in Iraq.

In testimony, Applicant stated that the last time he saw or spoke to his mother, brothers, and brothers-in-law, was in 2010 after his mother visited him in Iraq where he worked as a contract linguist. Likewise, he stated that he has not had contact with his sisters in seven years. He stated that his SCA entries showing regular contact with his family are incorrect. He noted in testimony that he visited with his sister-in-law in Iraq in 2013. He acknowledged that the contact with family members he reported in his counter-intelligence interviews were false. He noted in his testimony that he gave answers during the counter-intelligence interviews that seemed appropriate at the time as he was concerned with how he would be viewed if he stated that he had no contact. Applicant also claimed to have never given a large sum of money to his mother to buy a home, and noted that he did give small amounts of Iraqi dinars, not dollars, over a period of years, to assist his mother. He noted that he did not consider his mother to be a foreign person.

Applicant testified to the dangerous work he has done in Iraq as an interpreter, including for U.S. military personnel, and work as a U.S. military recruiter of Farsi, Arabic and Kurdish speaking soldiers in the U.S. He also discussed life as a Kurdish refugee from Iraq and his escape and immigration to the United States. He submitted a statement of intent to have minimal or no contact with foreign personnel outside of his official duties, and conversations will remain casual and infrequent. He also stated his intent to refrain from sending money to foreign family members in the future.

Applicant lives in the United States with his spouse and three children. He owns a home valued at about \$300,000, and has about \$80,000 in saving. His spouse is a stay-at-home mother and his children live at home. Applicant is a loyal American citizen and appreciates the opportunities that the United States has given to him and his family.

Republic of Iraq

Iraq is a constitutional parliamentary republic that has inconsistent control over security forces operating in the country. Violence continued to divide the country, largely fueled by Da’esh’s (ISIS) actions. Violence continues to cause civilian hardships. In 2017, there were over three million internally displaced persons, and the government has been

³ GE 2, p. 12, 26-31.

unable to adequately support the rising humanitarian demands of refugees and displaced populations. Human rights problems are widespread. Terrorist groups continue to mount a large number of attacks throughout the country, and many of Iraq's armed Shia groups are backed by Iran. These groups continue to operate throughout Iraq and exacerbate sectarian tensions and human rights abuses.

The U.S. Government considers the potential personal security threats to U.S. Government personnel and employees in Iraq to be serious enough to require them to live and work under strict security guidelines. U.S. citizens, Iraqi security forces, and civilians in Iraq are at high risk for kidnapping and terrorist violence.

Law and Policies

The Director of National Intelligence (DNI) issued revised adjudicative guidelines (AG) in a Security Executive Agent Directive, effective for all decisions issued after June 8, 2017.

"[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 have 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 § 2.

National security eligibility is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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 a person's stability, trustworthiness, reliability, discretion, character, honesty, and judgment. AG ¶ 1(b).

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 that the 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.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance 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 the 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant 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).

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 ¶ 1(d).

Analysis

Guideline B, Foreign Influence

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

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 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, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

AG ¶ 7 has two conditions that could raise a security concern and may be disqualifying 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 is a U.S. citizen who maintains regular, frequent contact with his mother, siblings, and brothers-in-law, who are residents and citizens of Iraq. In addition, he has visited with his mother in 2010, and sister-in-law in 2013, while he was working in Iraq. Sending money to a family member in a foreign country does not necessarily raise a security concern, but may be evidence of a close relationship with the recipient. SOR ¶ 1.e is resolved in Applicant's favor as the allegations under Guideline B are fully and properly alleged in SOR ¶¶ 1.a – d.

The mere possession of close family ties with one or more family members living in Iraq 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. See *Generally* ISCR Case No. 03- 02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001). There is a rebuttable presumption that a person has ties of affection for, or obligation to, their immediate family members. See *generally* ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at *8 (App. Bd. Feb. 20, 2002).

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, the government ignores the rule of law including widely accepted civil liberties, a family member is associated with or dependent upon the government, the government is engaged in a counterinsurgency, terrorists cause a substantial amount of death or property damage, or the country is known to conduct intelligence collection operations against the United States. The relationship of Iraq with the United States, places a significant, but not insurmountable burden of persuasion on Applicant to demonstrate that his relationships with his family members living in Iraq do not pose a security risk. Applicant should not be placed into a position where he might be forced to choose between loyalty to the United States and a desire to assist a family member living in Iraq.

Applicant's relationship with his relatives who are foreign citizens living in Iraq creates a potential conflict of interest because of the potential for pressure to be placed on his family living in Iraq in an effort to cause Applicant to compromise classified information. These relationships create "a heightened risk of foreign inducement, manipulation, pressure, or coercion" under AG ¶ 7. Substantial evidence of Applicant's contacts with family who are citizens and residents of Iraq has raised the issue of potential foreign pressure or attempted exploitation. AG ¶¶ 7(a) and (b), apply, and further inquiry is necessary about potential application of any mitigating conditions.

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

(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 United States, 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 agency head or designee;

(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.

There is insufficient evidence to fully apply any of the mitigating conditions. Applicant has previously reported frequent contact with his mother, siblings, and in-laws, who are citizens and residents of Iraq. A key factor in the AG ¶ 8(b) analysis is Applicant's "deep and longstanding relationships and loyalties in the United States." Applicant immigrated to the United States in 1996, and he became a U.S. citizen in 2008. His spouse lives in the United States and she is also a naturalized U.S. citizen.

Applicant's years of support to DOD in Iraq and the United States as a linguist/translator, including the dangers that service may entail, weigh heavily towards mitigating security concerns. Applicant's relationship with the United States must be weighed against the potential conflict of interest created by his relationships with relatives who are citizens and residents of Iraq. Applicant's extended family currently lives in Iraq. Like every other resident of Iraq, they are at risk from ongoing kidnappings, violence and terrorism.

Applicant has frequent contact with his family in Iraq, and he has regularly sent money to help them. Applicant's relationships and loyalties in the United States do not outweigh his

familial interests in Iraq, especially given his professional work there. Applicant and his relatives in Iraq are potential targets, and Applicant's potential access to classified information could add risk to his relatives from lawless elements. In addition, his previous admissions that are contrary to his current testimony leave me with lingering questions and concerns. Foreign influence concerns under Guideline B are not mitigated.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is potentially applicable:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

When falsification allegations are controverted, as in this case, the Government has the burden of proving the allegations. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission.⁴ An applicant's level of education and business experience are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate.⁵

Appellant did not report financial support for his mother in Iraq on his SCA. Regardless of the amount or denomination, he reported that he never provided financial support for a foreign national, when the evidence shows he has a history of providing financial support. Applicant denied intentionally falsifying the SCAs by denying that he sent in excess of \$50,000, and argued that any money he sent was in Iraq dinars, not dollars, which could account for the difference in monetary amounts. That may be true, but he admitted in testimony and in counter-intelligence interviews to sending money to his mother over a period of years. That information should have been reported in his SCA. I find Applicant's failure to report the support he provided to foreign nationals on his SCA was an intentional falsification. AG ¶ 16(a) is applicable.

⁴ See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

⁵ ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

Conditions that could mitigate personal conduct security concerns are provided under AG ¶ 17. The following are potentially applicable:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and
- (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

I find no mitigating condition applicable to Applicant's failure to report his financial support for his family in Iraq on his SCA, given the inconsistencies between previous reports and his testimony. Applicant's inconsistent testimony and claimed falsification of his counter-intelligence interviews makes application of mitigating conditions impractical. His knowing and intentional lack of candor raises questions about his trustworthiness and willingness to comply with rules and regulations. No mitigating condition fully applies to alleviate the personal conduct concerns raised by the allegation that he failed to report financial support for a foreign national on his SCA.

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 have incorporated my comments under Guidelines B and E in my whole-person analysis.

A Guideline B decision concerning Iraq must take into consideration the geopolitical situation and dangers there. Iraq qualifies as a dangerous place because of the violence and terrorism taking place there. Terrorists continue to threaten the Iraqi Government, the interests of the United States, Iraqi citizens, U.S. military personnel, and those who cooperate and assist the United States. The Iraqi Government does not fully control the country and does not fully comply with the rule of law or protect civil liberties of its citizens.

Applicant's frequent contact with family in Iraq and history of financial support for his family in Iraq are a manifestation of his care and concern for them, and are admirable qualities. However, in the context of security law, those relationships raise important foreign influence security concerns, and they must be balanced against his connections to the United States. Given his inconsistent past statements to government investigators, his recent testimony does not overcome the Guidelines B or E concerns raised in the SOR.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. After weighing the disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the foreign influence or personal conduct security concerns raised in the SOR. Accordingly, I conclude Applicant has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

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 |
| Subparagraph 1.e: | For Applicant |
| Paragraph 2. Guideline E: | Against Applicant |
| Subparagraph 2.a: | 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's eligibility for a security clearance. Eligibility for access to classified information is denied.

Gregg A. Cervi
Administrative Judge