



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



In the matter of:)
)
) ADP Case No. 17-01398
)
Applicant for Public Trust Position)

Appearances

For Government: Nicholas T. Temple, Esq., Department Counsel
For Applicant: *Pro se*

12/14/2017

Decision

MURPHY, Braden M., Administrative Judge:

Applicant mitigated the trustworthiness concerns about her family connections to Afghanistan under Guideline B, foreign influence. Applicant's eligibility for access to sensitive information is granted.

Statement of the Case

On June 2, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under foreign influence. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Sensitive 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 effective within the DOD for SORs issued after September 1, 2006.

Applicant answered the SOR on June 20, 2017, and requested a hearing. The case was assigned to me on September 22, 2017. The Defense Office of Hearings and

Appeals (DOHA) issued a notice of hearing on October 17, 2017, scheduling the hearing for November 8, 2017. The hearing convened as scheduled. Government Exhibits (GE) 1-3 were admitted in evidence without objection. Applicant and her husband testified. She submitted no documents at the hearing. I held the record open until November 22, 2017, to allow Applicant to submit additional information. She timely submitted six documents, which are marked as Applicant's Exhibits (AE) A through AE F and admitted without objection. DOHA received the hearing transcript (Tr.) on November 16, 2017.

On December 10, 2016, the Director of National Intelligence issued Security Executive Agent Directive 4, National Security Adjudicative Guidelines (AG). These AGs apply to all adjudicative decisions issued on or after June 8, 2017. Applicant received a copy of the revised AGs with the Government's discovery package.¹ Any changes resulting from the issuance of new AGs did not affect my decision in this case.

Request for Administrative Notice

The Government submitted a written request that I take administrative notice of certain facts about Afghanistan.² Without objection, I have taken administrative notice of certain facts contained in the request that are supported by source documents from official U.S. Government publications. The facts are summarized in the Findings of Fact, below.

Findings of Fact

Applicant admitted the sole SOR allegation, ¶ 1.a, with a narrative explanation. Her admission and explanation are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 47 years old. She was born in Afghanistan in 1970. She left with her family after the Soviet Union invaded Afghanistan in 1979. She came to the United States with her parents and her sister in 1982, at age 12. Her two brothers came to the United States earlier. (Tr. 41-45; GE 1)

Applicant has lived in the United States since 1982. She graduated from high school, college, and graduate school in the United States. She became a United States citizen in 1992. For much of her career, Applicant has worked as a business analyst in the health care industry. In connection with her employment, she submitted an application for a position of public trust in February 2014. Applicant's parents and all of her siblings are United States citizens. (Tr. 45-47; GE 1)

¹ Hearing Exhibit (HE) I; Tr. 8-11. Pre-hearing e-mail correspondence was marked HE II.

² Administrative Notice (AN) Exhibit I.

Applicant and her husband have been married for 20 years. They have three children, ages 12, 15 and 17, all native-born U.S. citizens. (Tr. 50, GE 1). Applicant's husband was born in the United States. He has a similar position in the health care industry, though for a different company. (Tr. 79; GE 1)

The sole SOR allegation concerns Applicant's father-in-law. He was born and raised in Afghanistan. After graduating from college, he became a diplomat. He served Afghanistan in several foreign locations during his career. This included a lengthy assignment in the United States. (Tr. 97-99; AE A, AE B)

Applicant's father-in-law and his family were stationed in Afghanistan at the time of the Soviet invasion, and, like Applicant and her family, they fled the country soon thereafter. (Tr. 100-101) They resettled in the United States in 1981. He spent many years (1986-2001) as a state government employee. (Tr. 101; AE B). Applicant's father-in-law and her mother-in-law are now U.S. citizens, and they live in the United States. (GE 1 at 27-29; AE C)

In about 2002, after the Taliban was removed from power, Applicant's father-in-law was asked to return to diplomatic service for Afghanistan. Between 2002 and 2014, he held several high-ranking diplomatic positions.³ His wife often accompanied him. (Tr. 50-56, 61-72, 101-109; AE B) Through her husband, Applicant was aware of her father-in-law's resumed diplomatic role. Applicant did not visit her father-in-law, however, as she was raising her children at home. (Tr. 82-84; AE A)

Applicant's father-in-law retired from diplomatic service in 2014. His last post was as a senior advisor. (AE A, AE B) He and his wife returned to their home in the United States, where they remain. Applicant's mother-in-law manages a convenience store, and he sometimes helps. (Tr. 105) Applicant's husband is not aware whether his father receives a pension or any retirement benefits from the Afghan government. (Tr. 75)

Applicant's father-in-law remains a dual citizen of both the United States and Afghanistan, and he maintains valid passports from both countries. (AE C, AE D) His Afghan passport, issued in February 2014, listed his former Afghan government position. (AE D) Applicant testified that her mother-in-law has a United States passport, and has traveled on it. (Tr. 78)

Applicant's father-in-law stated in a letter submitted after the hearing that he had infrequent ("scarce") conversations with Applicant, and they concerned only family matters. He said he never discussed his job with her. (AE A) Applicant testified that when she sees her father-in-law, they discuss only matters related to health and family. She also stated that her father-in-law has not asked her about her job or why she needs a determination of public trust. (Tr. 59-61)

³ In the interest of protecting Applicant's identity, I have identified neither the specific diplomatic positions her father-in-law held, nor where he was assigned, though these details are in the record. (AE B)

SOR ¶ 1.a alleges that Applicant's father-in-law "was a senior advisor to Afghanistan president Hamid Karzai until at least 2014." This is taken from a statement in Applicant's interrogatory response. However, Applicant also stated (as she did in her answer, and at the hearing) that her father-in-law's employment was with the Afghan Foreign Ministry, rather than as a direct advisor to the Afghan president. (GE 2 at 3; SOR answer)

Though they both testified at length about his diplomatic career, Applicant and her husband both clarified at hearing that they did not believe her father-in-law had any personal or other direct connection to then-President Karzai (Tr. 61, 106), nor did he have any connection to Afghanistan's current president. (Tr. 73). Applicant's husband testified that his father is "absolutely not" in contact with anyone in the Afghan government currently. He is not aware that his father is in any contact with anyone with whom he formerly worked in Afghanistan. (Tr. 110) Applicant's father-in-law has a brother and a nephew in Afghanistan, with whom he maintains some contact. (Tr. 72, 110)

Applicant and her husband have a combined annual income of about \$210,000. (Tr. 79-80) They own their home. They own no property or other assets in Afghanistan. (Tr. 74, 79) Applicant's husband testified that his father continues to own family property in Afghanistan. Her husband does not know if he stands to inherit it someday. (Tr. 110-111)

Applicant testified that she and her husband do not receive any financial support from his parents, nor do they receive any financial support from them. (Tr. 60-61) Applicant testified that she visits her in-laws four to six times a year, and they speak by phone about twice a month. Her husband speaks to his parents and his brother several times a week. (Tr. 58, 111-112)

Applicant provided letters of recommendation from two of her supervisors at work. They both attest to Applicant's strong work ethic, professionalism, and dedication to her job. They also praised her intelligence, sense of compassion, and her overall trustworthiness and reliability. (AE E, AE F)

The Islamic Republic of Afghanistan (Afghanistan)

The United States Department of State warns U.S. citizens against travel to Afghanistan because of continued instability and threats by terrorist organizations against U.S. citizens. Travel to all areas of Afghanistan remain unsafe due to the ongoing risk of kidnapping, hostage-taking, military combat operations, landmines, banditry, armed rivalry between political and tribal groups, militant attacks, direct and indirect fire, suicide bombings and insurgent attacks, including attacks using vehicle-borne or other improvised explosive devices. Attacks may also target official Afghan and U.S. government convoys and compounds, foreign embassies, military installations, and other public areas. Extremist groups and members of other armed opposition groups are active throughout the country, attacking Afghan and foreign government facilities,

with little regard for civilian casualties. Afghanistan continued to experience aggressive and coordinated attacks by the Taliban and other insurgent and terrorist groups.⁴

Afghanistan has significant human rights problems, including widespread violence, attacks on civilians and killing of persons affiliated with the government by armed insurgent groups; torture and abuse of detainees by government forces; widespread disregard for the rule of law; and little accountability for those participating in human rights abuses; as well as targeted violence and societal discrimination against women and girls.⁵

Policies

It is well established that no one has a right to a security clearance, or, as here, a determination of public trust.⁶ As the Supreme Court noted in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security [and trustworthiness] determinations should err, if they must, on the side of denials.”⁷

The adjudicative 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(a), 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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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

⁴ AN I. Items II and III of the Government’s administrative notice filing are from the State Department’s 2015 Country Reports on Terrorism, published in June 2016. The State Department updated this report in July 2017. See <https://www.state.gov/j/ct/rls/crt/2016/272233.htm> (U.S. State Department 2016 Country Report on Terrorism for South and Central Asia, published in July 2017). I take administrative notice of certain more recent (but largely similar) facts in the updated report, consistent with my obligation to make assessments based on timely information in cases involving foreign influence.

⁵ AN I.

⁶ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”).

⁷ 484 U.S. at 531.

mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable security decision.”

A person who seeks access to sensitive 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 sensitive information. Decisions include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Section 7 of Exec. Or. 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.”

Analysis

Guideline B, Foreign Influence

AG ¶ 6 expresses the trustworthiness concern regarding foreign influence:

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 sensitive or sensitive information or is associated with a risk of terrorism.

AG ¶ 7 describes conditions that could raise a trustworthiness concern and may be disqualifying. I have considered all of them and the following are potentially applicable:

- (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;
- (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 or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology; and

(e) shared living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.

AG ¶¶ 7(a) and 7(e) both require evidence of a “heightened risk.” The “heightened risk” required to raise this disqualifying condition is a relatively low standard. It denotes a risk greater than the normal risk inherent in having a family member living under a foreign government or owning property in a foreign country. The totality of Applicant’s family ties to a foreign country as well as each individual family tie must be considered.

Guideline B is not limited to countries hostile to the United States. “The United States has a compelling interest in protecting and safeguarding sensitive 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

Applicant’s father-in-law is a dual U.S.-Afghan citizen. The trustworthiness issue in this case concerns his status as a now-retired senior Afghan diplomat. Before the Soviet invasion of Afghanistan, he served in that capacity for many years. He and his family then immigrated to the United States in 1981. He became a United States citizen and he spent about 15 years as a state government employee. In 2002, he returned to Afghan diplomatic service, and served in several high-ranking positions. When he retired in 2014, he and his wife returned to the United States, where they remain today. He no longer has any ties to the Afghan government.

Afghanistan’s continued instability, the ongoing threat of violence from terrorist organizations, extremist groups and members of other armed insurgents, and the country’s serious ongoing human rights issues, all create a “heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.” Given Applicant’s contact with her father-in-law and his status as a retired Afghan diplomat, AG ¶¶ 7(a), 7(b) and 7(e) have been raised by the evidence.

I have analyzed the facts and considered all of the mitigating conditions under AG ¶ 8 and conclude 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

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

individual, group, organization, or government and the interests of the United States; and

(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.

Applicant's father-in-law resumed his diplomatic career with Afghanistan from 2002 to 2014, and served in several high-ranking positions. Ordinarily, this circumstance would be inherently problematic for an Applicant seeking a determination of public trust from the United States government. However, there are many circumstances here which weigh in Applicant's favor.

The foreign influence concerns in this case are increased because of Afghanistan's continuing instability and the persistent threat of terrorism and violence by armed insurgents. However, those concerns are lessened by the fact that Applicant's father-in-law is now retired and has returned to his life in the United States. He does not have any ongoing connection to the Afghan government which remains a trustworthiness concern for the Applicant.⁹ He remains an Afghan citizen, but he and his wife are also U.S. citizens. Given their age, there is every indication that they will live out their lives in the United States. These circumstances significantly lessen the risk that Applicant might be subject to exploitation, coercion, or duress through her relationship with her father-in-law. However, in light of the matters accepted for administrative notice, AG ¶ 8(a) has limited applicability.

Applicant was born in Afghanistan, but she has also lived in the United States since she was 12 years old. She was educated in the United States, and has been an American citizen for many years. Applicant's husband was also born in the United States, albeit to Afghan parents, while his father was stationed here as an Afghan diplomat. However, he has spent his adulthood in the United States. Applicant and her husband have been married for 20 years and are raising their children here. Applicant's parents and all of her siblings are citizens and residents of the United States. Applicant and her husband have no family members in Afghanistan with whom they maintain any contact. There is no evidence that they have travelled there in recent years, and they have no property interests there. Applicant and her husband maintain regular, frequent contact with his parents, but, as noted, they are both American citizens. Applicant can therefore be expected to resolve any conflict of interest in favor of the best interests of the United States. Applicant met her heavy burden of persuasion in establishing that AG

⁹ Given his long service as a diplomat. Applicant's father-in-law may well receive a pension from the Afghan government, even though Applicant and her husband may not be aware of it. However, there is no record evidence of this, and even if so, this is outweighed by the fact that Applicant's in-laws are citizens and residents of the United States.

¶ 8(b) applies to mitigate the foreign influence trustworthiness concerns arising in this case.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a trustworthiness determination 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(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(a), the ultimate determination of whether to grant eligibility for a determination of public trust 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. Applicant presented a strong case in mitigation and in support of her application for access to sensitive information. I observed Applicant's demeanor, and that of her husband, while they testified. I found both to be honest and credible witnesses. After carefully weighing the evidence, both favorable and unfavorable, and considering the whole-person factors set forth in AG ¶ 2(d), I find that Applicant mitigated the heightened concerns raised by her family connections to Afghanistan. The record evidence leaves me without questions or doubts as to her eligibility and suitability for access to sensitive information. For all these reasons, I conclude Applicant mitigated the trustworthiness 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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national security interests of the United States to grant Applicant's eligibility for access to sensitive information. Eligibility for access to sensitive information is granted.

Braden M. Murphy
Administrative Judge