



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



In the matter of:	)	
	)	
REDACTED	)	ISCR Case No. 17-02526
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Nicole A. Smith, Esq., Department Counsel  
For Applicant: *Pro se*

12/20/2017

**Decision**

MENDEZ, Francisco, Administrative Judge:

Applicant did not present sufficient evidence to mitigate security concerns raised by his connections to Afghanistan and his past Afghan government employment. Clearance is denied.

**Statement of the Case**

On September 8, 2017, the Department of Defense (DoD) sent Applicant a Statement of Reasons (SOR) alleging foreign preference and foreign influence security concerns. Applicant answered the SOR and requested a determination on the administrative (written) record. Department Counsel timely requested a hearing in the matter. Applicant, in turn, requested an expedited hearing.

On November 9, 2017, I was assigned the case. After coordinating with the parties and confirming that Applicant was waiving his right to 15-days advance written notice of the hearing, I scheduled his hearing for November 20, 2017. He appeared at the hearing, testified, and offered Exhibits A – D. Department Counsel offered Exhibits 1 – 4. Post-hearing, Applicant submitted several documents that were collectively marked Exhibit E. The exhibits offered by the parties were admitted into the record without objection. The

transcript was received by DOHA on November 30, 2017, and the record closed on December 8, 2017.<sup>1</sup>

### **Findings of Fact**

Applicant was born in Afghanistan. He immigrated to the United States in 1976, and became a U.S. citizen in 1992. He currently works for a rideshare service. A DoD contractor is sponsoring him for a security clearance to work as a linguist in Afghanistan. He submitted a security clearance application in connection with this prospective employment in 2015.<sup>2</sup>

From November 2004 to April 2005, Applicant worked as a U.S. Government (USG) contractor in Afghanistan. He was recognized by the USG for his contributions. He was then able to use his familial and social connections to a high-level Afghan official to obtain high profile-profile positions within the Afghan government. He obtained an Afghan passport for his Afghan government work. He was employed by the Afghan government from 2005 to 2015. He received an award for his service to the Afghan government.

Applicant voluntarily disclosed the information about his Afghan government service and foreign connections on his security clearance application. He also discussed them during the course of his background interviews. He does not maintain contact with any of the people he served with while employed by the Afghan government. He has infrequent contact with the former high-level Afghan government official who appointed him and who is referenced in SOR 2.c. Recently, a representative of a foreign government, who had come into brief contact with Applicant at a conference years earlier, immediately recognized him as a former Afghan government official.<sup>3</sup>

Applicant's sisters are Afghan citizens, residing in Afghanistan and Pakistan. They have no connection to the Afghan government. His cousin serves in a high-level Afghan government post. His brother served in a high-level Afghan government position, but was assassinated by the Taliban or other armed forces. Applicant has infrequent contact with his foreign relatives, and has no current ties or connections to the Afghan government. He has no property, assets, or financial interests in Afghanistan.<sup>4</sup>

Applicant is married and has three adult children who are U.S.-born citizens. His oldest child works for DoD. Applicant notes he has the skill set required for the linguist position and the desire to help the United States succeed in Afghanistan. He adamantly

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<sup>1</sup> Correspondence and other administrative document were collectively marked Appellate Exhibit I. Applicant again waived the 15-days notice requirement at hearing. Transcript (Tr.) at 7, 20.

<sup>2</sup> Tr. 11-12, 32, 34-44, 66-68; Exhibits 1 -3; Exhibit E. In order to protect Applicant's privacy, particular facts and circumstances were omitted. Specific information is available in the cited portions of the record.

<sup>3</sup> Tr. 12-13, 17, 32, 34-61, 69-78, 84-89; Exhibits 1 – 3; Exhibits B- D.

<sup>4</sup> Tr. 62-66, 72-75; Exhibit 1 at 34. Applicant's uncle was not alleged as a security concern. This foreign familial was only considered in assessing mitigation and conducting a whole-person assessment.

states that he is incorruptible and fiercely loyal. He is willing to accept the risk associated with the prospective employment as a USG contractor in Afghanistan.<sup>5</sup>

#### Administrative Notice - Afghanistan.<sup>6</sup>

Afghanistan is an Islamic Republic with a directly elected president, a bicameral legislative branch, and a judicial branch. The United States military has been engaged in Afghanistan since 2001. The State Department reports that, between 2001 and 2016, over 2,200 U.S. military members have died in Afghanistan. Additionally, over 20,000 U.S. service members have been wounded in action.

In July 2012, Afghanistan was designated by the United States as a major non-NATO ally. Notwithstanding the efforts of the U.S. and its coalition partners, Afghanistan continues to face daunting challenges. Taliban, terrorists, and other hostile forces remain active throughout Afghanistan and pose a serious threat. The State Department warns U.S. citizens against travel to Afghanistan because of continued instability and threats against U.S. citizens. The State Department also reports the commission of human rights violations in Afghanistan, including the widespread disregard for the rule of law and official impunity for those who committed human rights abuses.

### **Law, Policies, and Regulations**

This case is decided under Executive Order (E.O.) 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 on June 8, 2017, through Security Executive Agent Directive 4 (SEAD-4). ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003) (security clearance decisions must be based on current DoD policy and standards).

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Instead, persons are only eligible for access to classified information “upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865 § 2.

When evaluating an applicant’s eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. AG ¶ 2.

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<sup>5</sup> Tr. 16-18, 23-25, 32, 79-82, 95; Exhibit A.

<sup>6</sup> See generally Exhibit 4; as updated by publically-available U.S. State Department documents, which were collectively marked Appellate Exhibit II.

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15.

Administrative Judges must remain fair and impartial, and carefully balance the needs for the expedient resolution of a case with the demands of due process. Therefore, an administrative judge will ensure that an applicant: (a) receives fair notice of the issues, (b) has a reasonable opportunity to address those issues, and (c) is not subjected to unfair surprise. Directive, ¶ E3.1.10; ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

In evaluating the evidence, a judge applies a “substantial evidence” standard, which is something less than a preponderance of the evidence. Specifically, substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive, ¶ E3.1.32.1.<sup>7</sup>

Any doubt raised by the evidence must be resolved by a judge in favor of the national security. AG ¶ 2(b). See *also* SEAD-4, ¶ E.4. Additionally, the Supreme Court has held that responsible officials making “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

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. 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 an 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.

## **Analysis**

### **Guideline B, Foreign Influence, and Guideline C, Foreign Preference**

Applicant’s connections in Afghanistan allowed him to obtain high-level, sensitive Afghan government positions. These connections raise the security concern that he could be subject to foreign influence. Furthermore, his ten years of faithful Afghan government service raises the concern that he may provide information or make decisions that are inconsistent with his obligation to place the national security interest of the United States

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<sup>7</sup> However, a judge’s mere disbelief of an applicant’s testimony, without actual evidence of disqualifying conduct or admission by an applicant to the disqualifying conduct, is not enough to sustain an unfavorable finding. ISCR Case No. 15-05565 (App. Bd. Aug. 2, 2017); ISCR Case No. 02-24452 (App. Bd. Aug. 4, 2004). Furthermore, an unfavorable decision cannot be based on solely non-alleged conduct. ISCR Case No. 14-05986 (App. Bd. May 26, 2017). Unless an applicant is provided notice that unalleged conduct raises a security concern, it can only be used for specific limited purposes, such as assessing mitigation and credibility. ISCR Case No. 16-02877 at 3 (App. Bd. Oct. 2, 2017).

above all other concerns and considerations. See generally AG ¶¶ 6 and 9 (explaining detail the foreign influence and foreign inference security concerns).

In assessing the security concerns at issue, I considered all disqualifying and mitigating conditions listed under both guidelines, including the following:

AG ¶ 7(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;

AG ¶ 7(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;

AG ¶ 7(i): conduct, especially while traveling or residing outside the U.S., that may make the individual vulnerable to exploitation, pressure, or coercion by a foreign person, group, government, or country;

AG ¶ 8(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 . . . and the interests of the United States;

AG ¶ 8(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;

AG ¶ 8(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; and

AG ¶ 10(d): participation in foreign activities, including but not limited to: assuming or attempting to assume any type of employment, position, or political office in a foreign government or military organization.

Applicant did not meet his burden of proof and persuasion. The disqualifying conditions at AG ¶¶ 7(a), 7(b), and 10(d) apply. None of the mitigating conditions fully apply and the favorable record evidence is insufficient to outweigh the serious security concerns raised by Applicant's past and present connections to Afghanistan and his ten years of Afghan government service. In reaching this conclusion, I considered the whole-

person concept and specifically, the record evidence regarding Applicant's security conscientiousness in protecting sensitive information regarding the travel of high-level officials to Afghanistan. Nevertheless, the evidence submitted by Applicant is insufficient to mitigate concerns that he could be subjected to influence by and through his familial and other connections to Afghanistan. His prior Afghan government service undercuts the evidence regarding his U.S. ties.

Furthermore, Applicant and several of his relatives served or continue to serve in unique, high-level Afghan government posts. His former prominent role in the Afghan government has not escaped the attention of others, as evidenced by the recent run-in with a representative of a foreign government. Applicant's own unique background could bring him to the attention of hostile elements in Afghanistan and make him a relatively valuable, high-level target of opportunity for those wishing to do harm to the United States. In light of Applicant's unique circumstances, the favorable evidence he provided is insufficient to outweigh the security concerns at issue. Foreign influence and foreign preference security concerns remain. *See generally* ISCR Case No. 12-05231 (App. Bd. July 25, 2014) (although applicant had no living relatives in Afghanistan, adverse decision affirmed because applicant's background raised similar unique 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 C (Foreign Preference):	AGAINST APPLICANT
Subparagraphs 1.a – 1.c:	Against Applicant
Paragraph 2, Guideline B (Foreign Influence):	AGAINST APPLICANT
Subparagraph 2.a - 2.c:	Against Applicant

### **Conclusion**

In light of the record evidence, it is not clearly consistent with the interests of national security to grant Applicant initial or continued eligibility for access to classified information. Applicant's request for a security clearance is denied.<sup>8</sup>

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Francisco Mendez  
Administrative Judge

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<sup>8</sup> In light of Applicant's past work as a USG contractor in Iraq, unique language skills, and the other favorable record evidence, I considered the exceptions listed in SEAD-4, Appendix C. However, the applicability of this Appendix to contractor cases adjudicated under the Directive remains a question. Furthermore, even if applicable, no implementation guidance has been issued. Thus, I decline to rule or provide a recommendation on whether any of the exceptions are warranted in this case.