



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 17-02676

**Appearances**

For Government: Daniel F. Crowley, Esq., Department Counsel

For Applicant: *Pro se*

01/31/2018

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke his eligibility for access to classified information. The evidence is sufficient to mitigate the security concern based on his family ties to Iraq, the country of his birth, from which he fled. Accordingly, this case is decided for Applicant.

**Statement of the Case**

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on November 14, 2016.<sup>1</sup> This document is commonly known as a security clearance application. Thereafter, on September 15, 2017, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility, Fort Meade, Maryland, sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was

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<sup>1</sup> Exhibit 3.

clearly consistent with the national interest to grant him eligibility for access to classified information. The SOR is similar to a complaint. It detailed the factual reasons for the action under the security guideline known as Guideline B for foreign influence based on his family ties to Iraq.

Applicant answered the SOR on September 26, 2017. He admitted the SOR allegations and explained the circumstances surrounding his family ties to Iraq. He requested a decision based on the written record in lieu of a hearing. He did not submit supporting documentation with his answer.

On October 13, 2017, Department Counsel submitted all relevant and material information that could be adduced at a hearing. The file of relevant material (FORM) consists of Department Counsel's written brief and supporting documentation, some of which are identified as evidentiary exhibits in this decision. The FORM was mailed to Applicant, who received it on October 23, 2017. He made a timely reply consisting of several pages of documentation concerning his U.S. family members, which are admitted without objections as Exhibits A through K. The case was assigned to me on January 16, 2018.

### **Procedural Matters**

The FORM includes Exhibit 6, which is a report of investigation (ROI) summarizing Applicant's interview that took place during the 2016 background investigation. The ROI is not authenticated by a witness, as required under ¶ E3.1.20 of the Directive.<sup>2</sup> Likewise, Section 5(a) of Executive Order 10865 prohibits receipt and consideration of "investigative reports" without authenticating witnesses. The Directive provides no exception to the authentication requirement. Indeed, the authentication requirement is the exception to the general rule that prohibits consideration of an ROI. Accordingly, given the lack of authentication, I have not considered the ROI in reaching my decision.

I also note that Department Counsel's written brief includes a footnote advising Applicant that the ROI was not authenticated and that failure to object may constitute a "waiver" of the authentication requirement. It is my view that Department Counsel is misusing the term waiver,<sup>3</sup> and this misuse may confuse an applicant. In the law of evidence, errors are preserved by timely objections, and relief on appeal is granted from a preserved error unless it is harmless (the harmless-error doctrine). Waiver is the voluntary relinquishment or abandonment of a legal right or advantage. With a waiver, there is no error to correct on appeal and no relief to grant. On the other hand, failure to

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<sup>2</sup> See generally ISCR Case No. 12-10933 (App. Bd. Jun. 29, 2016) (In a concurring opinion, Judge Ra'anani notes the historical concern about reports of investigation in that they were considered by some to present a heightened problem in providing due process in security clearance cases. Judge Ra'anani raises a number of pertinent questions about using an unauthenticated ROI in a non-hearing case with a *pro se* applicant.).

<sup>3</sup> See *United States v. Olano*, 507 U.S. 725 (1993) (the Supreme Court distinguishes between forfeiture and waiver).

make a timely objection usually forfeits any error, and relief on appeal is appropriate from a forfeited error only upon a showing that the error was plain, obvious, and prejudicial (the plain-error doctrine). This brief discussion highlights the complexity involved in expecting a layman applicant to understand the concepts of authentication, waiver, forfeiture, and admissibility, as those concepts are used in deciding a security clearance case based on the written record in lieu of a hearing. This is especially a concern here since Applicant did not receive his formal education in the United States and English is not his native language.

### **Findings of Fact**

Applicant is a 38-year-old employee who requires a security clearance for his job as an interpreter in support of the U.S. armed forces. His formal education includes enrollment in a local community college since 2015. A native of Iraq, he was born in a city of Iraqi Kurdistan. He is married, and he and his wife had four children, two born in Iraq and two born in the United States. His eldest minor child, a daughter, passed away due to a serious medical condition in 2015.<sup>4</sup> His wife and three minor children are U.S. citizens by birth or naturalization, and they reside in the United States.<sup>5</sup>

During 1999-2007, Applicant was the owner of a small business in a major city in northern Iraq. In 2007, he closed the business due to terrorism.<sup>6</sup> He was threatened in an attempt to extort money and he refused to pay. After that, the terrorists attacked (with gunfire) Applicant while he was traveling in a car, resulting in the death of his sister and a badly injured daughter. The terrorists were run off by Iraqi police after a firefight. He, along with his wife and two minor children, left Iraq in 2008 and fled to Turkey where they sought protection from the United Nations. About a year later, he and his family were granted permission to immigrate to the United States as refugees.

Applicant has been employed steadily since his arrival in the United States.<sup>7</sup> He worked as a role player for a federal contractor at a U.S. military installation during 2010-2011. He went through counterintelligence screening for that employment, and he disclosed the terrorism attack discussed above.<sup>8</sup> He was then self-employed as the manager of a small retail business during 2011-2014. He was then employed as the manager of a small retail business during 2014-2015. He has since worked as an Uber driver. After becoming a naturalized U.S. citizen in 2016, he obtained his current position with a federal contractor in November 2016. Presumably, if granted a clearance, he will be required to live and work in Iraq in support of the U.S. armed forces, a task which he is more than willing to do, describing it as an opportunity to give

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<sup>4</sup> Exhibit E.

<sup>5</sup> Exhibits A-K.

<sup>6</sup> Exhibit 4.

<sup>7</sup> Exhibit 3.

<sup>8</sup> Exhibit 4.

back to the United States in appreciation for his immigration and resettlement of his family here.<sup>9</sup>

As alleged in the SOR and admitted in his answer, Applicant has several family members who are citizens of and residents in Iraq. His mother, two brothers, a sister, and mother-in-law are all present in Iraq. His family live in a city of Iraqi Kurdistan. He is in contact with his elderly mother through his brothers to inquire about her well-being, and he provides some financial assistance to her. He has less contact with his sister. His mother-in-law lives in the same major city in northern Iraq in which he lived and ran his small business during 1999-2007. His wife is in regular contact with her mother by telephone.

Administrative or official notice is taken of certain facts about Iraq as described in Department Counsel's written request.<sup>10</sup> The situation in Iraq is well known within the Defense Department and it is unnecessary to discuss those facts at great length here. In general, the overall security situation in Iraq is fluid and at times quite unstable if not deadly after many years of war. The risk of terrorism remains high (for example, a double-suicide bombing in central Baghdad in January 2018 killed dozens of people).

### **Law and Policies**

This case is adjudicated under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective June 8, 2017.<sup>11</sup>

It is well-established law that no one has a right to a security clearance.<sup>12</sup> As noted by the Supreme Court in *Department of the Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>13</sup> Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security. In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.<sup>14</sup> The Appeal Board has

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<sup>9</sup> Answer to SOR.

<sup>10</sup> Exhibit 5.

<sup>11</sup> The 2017 AG are available at <http://ogc.osd.mil/doha>.

<sup>12</sup> *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"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10<sup>th</sup> Cir. 2002) (no right to a security clearance).

<sup>13</sup> 484 U.S. at 531.

<sup>14</sup> 484 U.S. at 531.

followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.<sup>15</sup>

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.<sup>16</sup> An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.<sup>17</sup>

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>18</sup> The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>19</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>20</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>21</sup>

## **Discussion**

The gravamen of the SOR under Guideline B is whether Applicant's family ties to Iraq should disqualify him from access to classified information. Under Guideline B for foreign influence,<sup>22</sup> the suitability of an applicant may be questioned or put into doubt due to foreign contacts and interests. The overall concern is:

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

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<sup>15</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>16</sup> Directive, ¶ 3.2.

<sup>17</sup> Directive, ¶ 3.2.

<sup>18</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>19</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>20</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>21</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>22</sup> AG ¶¶ 6, 7, and 8 (setting forth the concern and the disqualifying and mitigating conditions).

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.<sup>23</sup>

Given the evidence of Applicant's family ties to Iraq, I have considered the following disqualifying and mitigating conditions under Guideline B as most pertinent:

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 ¶ 8(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions of 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; and

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.

Based on U.S. concerns about the risk of terrorism, Iraq meets the heightened-risk standard in AG ¶ 7(a). This conclusion is based on the facts set forth in Department Counsel's written request for administrative notice.<sup>24</sup>

Applicant's family ties to Iraq are sufficient to raise a concern under Guideline B. Applicant's mother, siblings, and mother-in-law are citizen-residents of Iraq. It is presumed that he or his wife or both have feelings of affection or obligation or both toward those family members. With that said, Applicant has the signs of being a mature and responsible person. He has lived and worked in the United States since shortly after his arrival here in 2009. He is now a 38-year-old husband and father of three minor children. He is seeking to support his family by working as an interpreter in support of the U.S. armed forces in Iraq, which is a high-risk endeavour. He's willing to

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<sup>23</sup> AG ¶ 6.

<sup>24</sup> Exhibit 5.

take that risk not only for his own financial interest, but also as a way of giving back to his adopted country. Although he has several close family members in Iraq, he also has strong family ties to the United States consisting of his spouse and three minor children, two of whom are native-born U.S. citizens. His ties or contacts with his family in Iraq are about what you would expect given his age, financial means, and family circumstances. There is nothing out of the ordinary about his family ties to Iraq.

This process is not a zero-risk program, because nearly every applicant presents some risk or concern. Many security clearance cases come down to balancing that risk or concern. Here, Applicant has family ties to Iraq. Such circumstances should not be dismissed or overlooked as fanciful or unrealistic, especially in light of the matters the United States views of concern in Iraq. Indeed, Applicant was the victim of a terrorist attack in Iraq in 2007, which was the motivation for him to flee Iraq for a better life for his family. Nevertheless, on balance, I am satisfied that the strength of his ties to the United States outweigh and overcome his ties to Iraq. This is not a case of “divided allegiance” with an applicant who has one foot in each country. In contrary, Applicant appears to have both feet planted here in the United States and his ties to the United States will grow stronger over time. Viewing the record evidence as a whole, Applicant can be expected to resolve any potential concern or potential conflict of interests in favor of the U.S. interest.

### **Formal Findings**

The formal findings on the SOR allegations are:

Paragraph 1, Guideline F:	For Applicant
Subparagraphs 1.a – 1.d	For Applicant

### **Conclusion**

It is clearly consistent with the national interest to grant Applicant access to classified information.

Michael H. Leonard  
Administrative Judge