



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 14-05793
)
 Applicant for Security Clearance)

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: *Pro se*

03/22/2016

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on March 4, 2014. On April 27, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline B.¹ The DOD CAF acted under Executive Order 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.

Applicant answered the SOR on May 25, 2015, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on November 4,

¹ The SOR also alleged security concerns under Guideline E (Personal Conduct), but those allegations were withdrawn on November 2, 2015.

2015, and the case was assigned to me on November 23, 2015. On January 20, 2016, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for February 9, 2016. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibit (AX) A, which was admitted without objection. DOHA received the transcript (Tr.) on February 16, 2016.

Findings of Fact

In his answer to the SOR, Applicant admitted SOR ¶¶ 1.a, 1.b, and 1.d-1.f. He denied SOR ¶ 1.c, explaining that one of his two brothers is a citizen and resident of the United States. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 28-year-old linguist employed by defense contractors since April 2005. He was unemployed from January to May 2008 and March to August 2010, between jobs with defense contractors. He has never held a security clearance.

Applicant was born in Afghanistan, where he attended high school and college. He received an associate's degree from Kabul University in December 2007, and he worked as a linguist for a defense contractor in Afghanistan from April 2005 to January 2008. In January 2008, he entered the United States with his wife under a special visa program for linguists serving with the U.S. Armed Forces in Afghanistan. (AX A at 8; Tr.32.) Their two children, ages seven and six, are native-born U.S. citizens. His wife is the only member of his family who knows that he is applying for a security clearance. (Tr. 21.)

Applicant's father, mother, four sisters, father-in-law, mother-in-law, and three sisters-in-law are citizens and residents of Afghanistan. One of his brothers is a naturalized U.S. citizen and lives in the United States. His other brother resides in the United States and has applied for U.S. citizenship. (Tr. 33.) His brothers also worked as linguists for the U.S. Armed Forces before coming to the United States. (Tr. 39.)

Applicant's father is a retired police officer. He was a member of the Afghan National Police until the Taliban took over the government. He was unemployed under the Taliban regime. He rejoined the Afghan National Police in 2001 after the fall of the Taliban and served until he retired in 2002 or 2003 (Tr. 40-41.) Applicant's mother has never worked outside the home.

Applicant's four sisters are citizens and residents of Afghanistan. They are all married and live in Kabul. Applicant does not know the specific occupations of their husbands, but he knows that none of them are connected to the Afghan military or security forces. (Tr. 43.) His family members believe he works as an administrator for defense contractors, but they do not know that he works as a linguist. (Tr. 58.)

Applicant's sisters-in-law live in Kabul and are citizens of Afghanistan. They are all students and unmarried. (Tr. 43-44.)

Applicant's mother-in-law is a retired public school teacher. His father-in-law is an officer in the Afghan National Army. Applicant does not know his father-in-law's rank or duties. (Tr. 41-43.)

Applicant also has extended family members (aunts, uncles, and cousins) who are citizens and residents of Afghanistan. They all live in Kabul. Applicant does not believe that any of them are connected to the Afghan military, security forces, or intelligence community. He has virtually no contact with them. (Tr. 44-45.)

Applicant has no property or assets in Afghanistan. (Tr. 47.) He has contact by telephone or Skype with family and in-laws in Afghanistan about four times a year. (Tr. 48) He never visits them in person because it would be a security breach and cause for termination of his employment. (Tr. 48-49.)

Applicant began working as a linguist for U.S. Armed Forces in Afghanistan around 2003, when he was 16 or 17 years old. He had learned English through private learning centers, because English was banned under the Taliban regime. (Tr. 35-36.) His family risked being punished by the Taliban for allowing him and his brothers to learn English. (Tr. 55-56.)

While working as a linguist in Afghanistan, Applicant worked with U.S. soldiers who were "embedded trainers." They trained the Afghan soldiers and accompanied them on operational missions. Applicant wore a helmet and body armor but was not allowed to carry a weapon. He came under fire for the first time when he was 17 years old. He testified, "It's not a very good feeling when you think that you're going to die. But there was always something inside me that would tell me that, no, you know, be brave. Everything will be fine." (Tr. 61.) In later assignments, he participated in training Afghan soldiers "inside the wire," but then accompanied them on operational missions. (Tr. 61-62.) He received numerous accolades for his performance of duty between 2003 and 2008, including a strong letter of recommendation from a U.S. Army brigadier general. (AX A.)

Applicant deployed to Afghanistan again in 2012 and 2014. He was scheduled to deploy again shortly after the hearing. (Tr. 47, 69; GX 1 at 12-14.)

In accordance with Department Counsel's request (GX 3), I have taken administrative notice that Afghanistan has been an independent nation since 1919, and it was a monarchy until a military coup in 1973. Following a second military coup in 1978, a Marxist government emerged. In December 1979, the Soviet Union invaded and occupied Afghanistan, but they were resisted by the Afghan mujahedeen. The Soviet Union withdrew in February 1989 pursuant to an agreement signed by Pakistan, Afghanistan, the United States, and the Soviet Union. The mujahedeen were not a party to the agreement and refused to abide by it. The result was a civil war among several

factions, including the Taliban. By the end of 1998, the Taliban controlled most of Afghanistan, committed atrocities against minority populations, and provided sanctuary to terrorist organizations. U.S. military forces, along with forces from a coalition partnership, forced the Taliban out of power by November 2001. With the assistance and support of the United States, a new democratic government took office in 2004. The effectiveness of the central government of Afghanistan has increased, but local governments are weak and corruption is widespread.

I also have noted that Afghanistan's human rights record is generally poor, due to the continuing insurgency, the weak government, and ongoing recovery efforts from two decades of war. In spite of efforts by the U.S. and the government of Afghanistan, it continues to be a violent, unsafe, unstable country. The border area between Afghanistan and Pakistan remains a safe haven for insurgents and criminal groups. The weak government and internal instability have enabled hostile states, non-state actors, terrorists, and insurgents to continue operating in Afghanistan, including groups hostile to the United States. Insurgents use narcotics trafficking and kidnapping to finance their military and technical capabilities. Suicide bombing attacks continue to inflict large numbers of casualties. Insurgent groups encourage Afghan security personnel to conduct insider attacks ("green on blue" attacks) to undermine the trust between the U.S. forces and contractors and their Afghan partners.

Policies

"[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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. 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 all available and reliable information about the person, past and present, favorable and unfavorable.

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.” See 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 ¶ 2(b).

Analysis

Guideline B, Foreign Influence

The SOR alleges that Applicant’s father, mother, and four sisters are citizens and residents of Afghanistan (SOR ¶¶ 1.a, 1.b, 1.d); and his two brothers are citizens of Afghanistan living in the United States (SOR ¶ 1.c). It also alleges that his father-in-law is a citizen and resident of Afghanistan and currently serves in the Afghan military (SOR ¶ 1.e). Finally, it alleges that Applicant has extended family members who are citizens and residents of Afghanistan (SOR ¶ 1.f).

The security concern under this guideline is set out in AG ¶ 6 as follows:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a

way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. 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.

Three disqualifying conditions under this guideline are relevant:

AG ¶ 7(a): contact 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 sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information; and

AG ¶ 7(d): sharing 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(d) require substantial evidence of a "heightened risk." The "heightened risk" required to raise one of these disqualifying conditions is a relatively low standard. "Heightened risk" denotes a risk greater than the normal risk inherent in having a family member living under a foreign government.

When family ties are involved, the totality of an applicant's family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003). "[T]here is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse." ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at * 8 (App. Bd. Feb. 20, 2002); see also ISCR Case No. 09-06457 at 4 (App. Bd. May 16, 2011). Applicant has not rebutted this presumption.

The ineffectiveness of the Afghan government, continuing threats from insurgent and extremist groups, and the government's poor human rights record are sufficient to establish the heightened risk required by AG ¶¶ 7(a) and 7(d) and the potential conflict of interest in AG ¶ 7(b). All three disqualifying conditions are established.

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

Furthermore, “even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security.” ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. Nevertheless, 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. 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, or the country is known to conduct intelligence operations against the United States. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. *See generally* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where administrative judge did not consider terrorist activity in area where family members resided).

The following mitigating conditions under this guideline are potentially relevant:

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, group, organization, or government and the interests of the U.S;

AG ¶ 8(b): there is no conflict of interest, either because the individual’s sense of loyalty or obligation to the foreign person, 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

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.

AG ¶ 8(a) is not established, for the reasons set out in the above discussion of AG ¶¶ 7(a), 7(b), and 7(d). AG ¶ 8(c) is established for Applicant’s in-laws and extended family members in Afghanistan, but it is not established for his parents and four sisters, because he has not rebutted the presumption that contacts with an immediate family member in a foreign country are not casual. ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002).

AG ¶ 8(b) is established. Applicant and his wife became U.S. citizens as soon as they were eligible. Their two children are native-born U.S. citizens. Applicant’s brothers

reside in the United States. One brother is a U.S. citizen, and the other has applied for U.S. citizenship. Applicant has worked for defense contractors for many years, and he has served reliably and faithfully under dangerous conditions. He and his wife qualified for special visas, due in large part to the recommendation of a U.S. Army brigadier general who was personally aware of Applicant's service in combat.

Generally, an applicant's prior history of complying with security procedures and regulations is considered to be of relatively low probative value for the purposes of refuting, mitigating, or extenuating the security concerns raised by that applicant's more immediate disqualifying circumstances. However, where an applicant has established by credible, independent evidence that his or her compliance with security procedures and regulations occurred in the context of dangerous, high-risk circumstances in which the applicant made a significant contribution to the national security, such circumstances give credibility to an applicant's assertion that he or she will recognize, resist, and report a foreign power or terrorist's attempts at coercion or exploitation. In this case, Applicant has a track record of complying with security regulations and procedures in high-risk circumstances in which he made significant contributions to national security. See ISCR Case No. 07-06030 at 3 (App. Bd. Jun. 19, 2008); ISCR Case No. 06-25928 at 4 (App. Bd. Apr 9. 2008).

Whole-Person Concept

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. In applying the whole-person concept, an 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. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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.

I have incorporated my comments under Guideline B in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant was candid, sincere, and credible at the hearing. He and his family have demonstrated an affinity for the United States since he was a student in high

school. He has demonstrated his reliability and trustworthiness by repeatedly putting himself in harm's way in support of U.S. interests in Afghanistan.

After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his family ties to Afghanistan. Accordingly, I conclude he has 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

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline B (Foreign Influence): FOR APPLICANT

Subparagraphs 1.a-1.f: For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge