



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



In the matter of:)
)
) ISCR Case No. 10-04666
)
Applicant for Security Clearance)

Appearances

For Government: Philip J. Katauskas, Esq., Department Counsel
For Applicant: *Pro se*

October 24, 2011

Decision

RIVERA, Juan J., Administrative Judge:

Applicant and his wife have immediate and extended family members that live in Afghanistan. He established that his ties and sense of obligation to the United States are sufficiently strong that he could be expected to resolve any conflict of interest in favor of the United States. He made significant contributions to deployed U.S. forces under dangerous, high-risk circumstances. He mitigated the foreign influence security concerns raised. Clearance is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on August 4, 2009. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request for a security clearance.

¹ Required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; and Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as revised.

On February 10, 2011, DOHA issued Applicant a Statement of Reasons (SOR), alleging security concerns under Guideline B (Foreign Influence) of the adjudicative guidelines (AG).² Applicant answered the SOR on March 4, 2011, and requested a hearing. The case was assigned to me on April 29, 2011. On May 2, 2011, I contacted Department Counsel to schedule the hearing. Applicant was deployed overseas working for a Government contractor. He requested a delay until his return to the United States.

On August 2, 2011, Applicant informed Department Counsel he would return to the United States in September 2011, and requested his hearing be scheduled during the month of September 2011. DOHA issued a notice of hearing on August 11, 2011, convening a hearing on September 7, 2011. At the hearing, the Government offered exhibits (GE) 1 through 4. GE 3 was not admitted, but was considered for purposes of taking administrative notice. GE 4 is a sworn statement provided by Applicant to DOHA during the security clearance process. It states that his sister (M) retired from her Afghan judicial position in January 2011. Applicant testified, presented one witness, and submitted exhibits (AE) 1 through 5. AEs 4 and 5 were received post-hearing. DOHA received the transcript of the hearing (Tr.) on September 15, 2011.

Findings of Fact

Applicant admitted the factual allegations in SOR ¶¶ 1.a, 1.b, and 1.c. He denied the SOR allegations under ¶ 1.d. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence, and having considered Applicant's demeanor and testimony, I make the following findings of fact.

Applicant is a 47-year-old linguist and cultural advisor working for a Government contractor in support of deployed U.S. military forces. Except for his children, Applicant, his wife, and their immediate and extended family members were born and raised in Afghanistan. Applicant graduated from high school in Afghanistan. He then attended the School of Veterinary Medicine, where he received his degree of Doctor of Veterinary Medicine in 1984.

In 1984, Applicant immigrated to the United States. His father had an important position within the Ministry of Education in Afghanistan. After the Soviet Union's invasion of Afghanistan, one of his brothers, and many other young Afghans, were imprisoned for questioning by the Soviet military. Many young men never returned home. His brother was imprisoned for nine years. He and his family were afraid he also would be imprisoned, and he immigrated to the United States. One of his brothers was already established in the United States, and he sponsored Applicant's entrance into the country.

Applicant resided with his brother for the next 16 years. He completed an associate's degree from a U.S. university in 1989. He also attended another U.S.

² Adjudication of this case is controlled by the AGs, implemented by the DOD on September 1, 2006.

university from 1993 until 1995, but did not complete a degree. He is in the process of completing his bachelor's degree and getting his veterinary license approved in the United States.

Applicant became a naturalized U.S. citizen in July 1990. He married his Afghan wife in September 1997. She also is a naturalized U.S. citizen. They have three children, born in the United States, ages, 13, 11, and 9. In 1998, Applicant purchased a home in the United States for him and his family. He also has a U.S. bank account and established U.S. college savings plans for two of his children. Applicant has no property or financial interests in Afghanistan.

From December 1997 until April 2009, Applicant worked as a veterinary technician for two different Veterinary Hospitals. He has been working as a linguist and cultural advisor for his current employer, a Government contractor, since July 2009. He has been deployed to Afghanistan in support of U.S. Army forces for most of his employment period.

After he immigrated to the United States in 1984, Applicant did not return to Afghanistan until he was deployed to that country in support of U.S. troops. He had telephone and mail contact with his family. However, he did not have face-to-face contact with his mother or any of his siblings during that same period, except for one of his sisters. In 2010, his sister (M) attended a judicial training conference in the United States for a period of two months. M visited Applicant during that period. At the time, M was a judge in Afghanistan. According to Applicant, she retired from her judicial position in January 2011. Applicant has three other sisters, all of whom are citizens and residents of Afghanistan. One worked as a teacher for the Afghan ministry of education. Another is an engineer and works for a private company. The last sister is a homemaker.

Applicant also has four brothers, two of which are U.S. residents. Another brother is a citizen and resident of Germany. The fourth brother is a resident and citizen of Afghanistan. According to Applicant, none of his immediate family members ever served in the Afghan military. To his knowledge, none of his siblings or relatives has ever been a member of an organization with interests inimical to the United States. Applicant maintains telephonic contact with his siblings. He communicates with them approximately four times a year during special holidays or birthday celebrations.

In early 2009, Applicant was informed of the opportunity to work as a linguist for a Government contractor. He decided it was a great opportunity for him to serve and protect the United States, his adopted country. He considers himself to be a patriotic, loyal American citizen, and he loves living in the United States. He is committed to contributing to the U.S. operations in Afghanistan. He wants to fight terrorism and bring democracy to Afghanistan. (Tr. 46)

Since 2009, Applicant received numerous letters of commendation and appreciation in recognition of his professionalism, exceptional performance, outstanding

linguist skills, and strong dedication in support of deployed U.S. military forces. He was considered to be an invaluable member of the U.S. task forces to which he was assigned. He received favorable letters of recommendation from two U.S. field grade officers. Applicant performed his duties under dangerous conditions in a hostile environment. He came under enemy fire during two different ambushes.

I take administrative notice of the following facts. Afghanistan is located in Southwestern Asia and borders Pakistan, Iran and Russia. It became an independent nation in 1919, after the British relinquished control. A monarchy ruled from 1919 until a military coup in 1973. Following a Soviet-supported coup in 1978, a Marxist government emerged. In 1979, Soviet forces invaded and occupied Afghanistan. A resistance movement eventually led to an agreement known as the Geneva Accords, signed by Afghanistan, Pakistan, the United States, and the Soviet Union, which ensured Soviet forces withdrew by February 1989. The resistance party was not part of the Accords and refused to accept it. A civil war ensued after the Soviet withdrawal. In the mid-1990s, the Taliban rose to power largely due to anarchy and the existence of warlords. The Taliban sought to impose an extreme interpretation of Islamic law and committed massive human right violations. The Taliban also provided sanctuary to Osama bin-Laden, al Qaida, and other terrorist organizations.

After the September 11, 2001, terrorist attacks, demands to expel Bin-Laden and his followers were rejected by the Taliban. U.S. forces and a coalition partnership commenced military operations in October 2001 that forced the Taliban out of power in November 2001. The new democratic government took power in 2004, after a popular election. Despite that election, terrorists including al Qaida and the Taliban continue to assert power and intimidation within the country. Safety and security are key issues, because these terrorists target United States and Afghan interests by suicide operations, bombings, assassinations, carjacking, assaults, and hostage taking. At this time, the risk of terrorist activity remains extremely high. The country's human rights record remains poor and violence is rampant.

Civilians continue to bear the brunt of the violence and increased attacks. Despite the loss of some key leaders, insurgents have adjusted their tactics and attempted to maintain momentum following the arrival of additional U.S. forces. It is suspected that the Taliban was most likely responsible for suppressing voter turnout in the August 2009 elections in key parts of the country. The Taliban's expansion of influence in northern Afghanistan since late 2007 has made the insurgency a country-wide threat.

Afghan leaders continue to face the eroding effect of official corruption and the drug trade. Criminal networks and narcotics constitute a source of funding for the insurgency in Afghanistan. Other insurgent groups and anti-coalition organizations also operate in Afghanistan. Insurgents have targeted non-government organizations, journalists, government workers, and United Nation workers. Instability along the Pakistan-Afghan frontier continued to provide al Qaida with leadership mobility and the ability to conduct training and operational planning, targeting Western European and

U.S. interests. The United States Department of State has declared that the security threat to all American citizens in Afghanistan remains critical as no part of the country is immune to violence.

The United States-Afghan relationship is summarized as follows:

After the fall of the Taliban, the U.S. supported the emergence of a broad-based government, representative of all Afghans, and actively encouraged a [United Nations] role in the national reconciliation process in Afghanistan. The U.S. has made a long-term commitment to help Afghanistan rebuild itself after years of war. The U.S. and others in the international community currently provide resources and expertise to Afghanistan in a variety of areas, including humanitarian relief and assistance, capacity-building, security needs, counter-narcotic programs, and infrastructure projects.

During his December 1, 2009 speech at West Point, President Barack Obama laid down the core of U.S. goals in Afghanistan, which are to disrupt, dismantle, and defeat al-Qaeda and its safe havens in Pakistan, and to prevent their return to Afghanistan. . . . The United States is willing to support fully the ambitious agenda set out by the recently re-elected Afghan president, focusing on reintegration, economic development, improving relations with Afghanistan regional partners, and steadily increasing the security responsibilities of the Afghan security forces.

U.S. Department of State, *Background Note: Afghanistan*, Dec. 6, 2010 at 12. The United States has more combat troops deployed to Afghanistan than to any other foreign country. This extraordinary commitment to Afghanistan is balanced against the inherent dangers of the ongoing conflict in Afghanistan to citizens and residents of Afghanistan.

Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable to reach his decision.

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 of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "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. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or 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 and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[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 government's concern under AG ¶ 6 is that:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, he or she 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.

AG ¶ 7 sets out conditions that could raise a security concern and may be disqualifying in this case, including:

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

The mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if only one relative lives in a foreign country and an applicant has contacts with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information.³ Applicant, by himself or through his wife and his mother and siblings, has frequent contacts and a close relationship of affection and obligation with his mother, mother-in-law, siblings, and other extended family members who are residents and citizens of Afghanistan.

These contacts create a risk of foreign pressure or attempted exploitation because there is always the possibility that Afghan agents, criminals, or terrorists operating in Afghanistan may exploit the opportunity to obtain information about the

³ See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

United States. With its negative human rights record, its government, and the violent insurgency that operates within the Afghan borders, it is conceivable that Applicant's family members could be vulnerable to coercion. Such circumstances in Afghanistan create a heightened risk.

The Government produced substantial evidence raising these two potentially disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove a mitigating condition. As previously indicated, the burden of disproving a mitigating condition never shifts to the Government.

Three Foreign Influence Mitigating Conditions under AG ¶ 8 are potentially applicable to these disqualifying conditions:

(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.;

(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

(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.

After considering the totality of the facts and circumstances in Applicant's case, I conclude that AG ¶ 8(b) applies. The other two mitigating conditions do not apply. Applicant's contacts in Afghanistan are not casual, infrequent, or minimal. He has close family ties in that country. His mother, mother-in-law, and six of his siblings are citizens and residents of Afghanistan. Notwithstanding, Applicant's behavior demonstrates that even if he was placed in a position of having to choose between the interests of his foreign family members and the interests of the United States, he would chose the U.S. interests. He immigrated to the United States in 1984, and did not visit Afghanistan until he was there in support of U.S. troops. After immigrating to the United States, he only had telephonic and mail contact with his Afghan relatives approximately four times a year. He only had personal contact with his sister M when she visited the United States for a judicial training conference.

In deciding whether Applicant's family members are in a position to be exploited, I considered Afghanistan's form of government.⁴ 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, a family member is associated with or dependent upon the government or the country is known to conduct intelligence collection operations against the United States.

The current relationship of Afghanistan's government with the United States places a burden of persuasion on Applicant to demonstrate that his relationships with his immediate relatives and extended family members living in Afghanistan do not pose a security risk. The problem in Afghanistan is the role of terrorists and the Taliban and its hostility to the United States. Applicant should not be placed in a position where he might be forced to choose between loyalty to the United States and a desire to assist his parents or their relatives living in Afghanistan who might be coerced by terrorists, criminals, or governmental entities in that country.

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, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. See ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002).

While there is no evidence that intelligence operatives, terrorists, or criminals from Afghanistan seek or have sought classified or economic information from or through Applicant, his mother, or his relatives living in Afghanistan, it is not possible to rule out such a possibility in the future. There is evidence of insurgency operations being conducted in Afghanistan against American forces. There is also evidence that Afghanistan has a dismal human rights record and has active terrorist groups operating within its borders. The conduct of terrorists in Afghanistan makes it more likely that terrorists would attempt to coerce Applicant through his relatives living in Afghanistan, if they determined it was advantageous to do so. This places the burden of persuasion on Applicant to demonstrate that his contacts in Afghanistan do not pose a security risk, and he is not in a position to be forced to choose between loyalty to the United States and his connections to family members.

⁴ The focus is not the country or its people, but its rulers and the nature of the government they impose. This approach recognizes that it makes sense to treat each country in accordance with the level of security concern or threat it presents to the United States.

Applicant's relationship with the United States must be weighed against the potential conflict of interest created by his relationship with his family members living in Afghanistan. Applicant feels an obligation and affection to his mother, siblings, and his wife's relatives.

Although there is a heightened risk that Applicant's family members in Afghanistan could be vulnerable to coercion, Applicant's behavior since 1984 has made it clear that his wife and children living in the United States are his main concern. He and his immediate family have established roots in the United States. He owns a home in the United States, his children attend public schools, and he has set aside funds for his young children's college education in the United States.

In cases of this nature, an additional analysis is necessary. The Appeal Board has stated:

As a general rule, 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 conduct or circumstances. However, the Board has recognized an exception to that general rule in Guideline B cases, where the applicant has established by credible, independent evidence that his compliance with security procedures and regulations occurred in the context of dangerous, high-risk circumstances in which the applicant had made a significant contribution to the national security. The presence of such circumstances can give credibility to an applicant's assertion that he can be relied upon to recognize, resist, and report a foreign power's attempts at coercion or exploitation.⁵

Applicant has been deployed to Afghanistan, a hostile and dangerous combat area, during most of his employment period. He was involved in ambushes and dangerous combat conditions and placed his life at risk while providing support for U.S. troops. His supervisors indicated they have no reservations about his loyalty and dedication to the United States, and highly recommend Applicant for future positions as a linguist.

Considering the evidence as a whole, I find Applicant established that his ties and sense of obligation to the United State are sufficiently strong that he could be expected

⁵ ISCR Cases No. 06-25928 at 4 (App. Bd. Apr 9, 2008) (internal citations omitted). See also ISCR Case No. 05-03846 at 6 (App. Bd. Nov. 14, 2006) (citing ISCR Case No. 01-03357 at 4 (App. Bd. Dec. 13, 2005)); ISCR Case No. 02-10113 at 5 (App. Bd. Mar. 25, 2005); ISCR Case No. 03-10955 at 2-3 (App. Bd. May, 30, 2006); ISCR Case No. 04-12363 at 2 (App. Bd. July 14, 2006); ISCR Case No. 04-12363 at 2 (App. Bd. July 14, 2006).

to resolve any conflict of interest in favor of the United States.⁶ Applicant mitigated the Guideline B security concerns.

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 the relevant circumstances. The 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.

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

Notwithstanding, the geopolitical situation in Afghanistan, as well as the dangers existing for his family members living in Afghanistan, I find that Applicant was able to mitigate the foreign influence security concerns. His ties and sense of obligation to the United States, and his immediate family in this country, are sufficiently strong that he could be expected to resolve any conflict of interest in favor of the United States. His service in a combat zone on behalf of the United States merits substantial mitigation weight. Overall, the record evidence leaves me with no questions as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the foreign influence security 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 B:	FOR APPLICANT
Subparagraphs 1.a - 1.d:	For Applicant

⁶ See ISCR Case No. 05-03846 at 6 (App. Bd. Nov 14, 2006).

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant eligibility for a security clearance to Applicant. Clearance is granted.

JUAN J. RIVERA
Administrative Judge