



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



In the matter of:)	
)	
-----, -----)	ISCR Case No. 07-09816
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: Heidi L. Evatt, Esquire

June 12, 2008

Decision

WHITE, David M., Administrative Judge:

Applicant was born in Afghanistan and came to live in the U.S. in 1973. His step-mother and nine half-siblings are foreign citizens and residents. He volunteered to serve as an interpreter and cultural expert in support of U.S. forces in Afghanistan. His service there, with an interim clearance, has been superior and performed at great personal risk. Based upon thorough review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Applicant submitted his Security Clearance Application (SF 86), on December 10, 2007. On February 8, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline B. The action was taken under Executive Order 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense (DoD) for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on February 29, 2008. He answered the SOR in writing (Answer) on March 16, 2008, and requested a hearing before an administrative judge. DOHA received the request on March 31, 2008. Department Counsel was prepared to proceed on April 23, 2008, and DOHA assigned the case to me on May 2, 2008.

DOHA issued a Notice of Hearing on May 6, 2008, and I convened the hearing as scheduled on May 15, 2008. During initial scheduling discussions with Department Counsel, Applicant requested prompt scheduling of his hearing so he could return to his duties supporting his Army special forces unit in Afghanistan as soon as possible. He agreed to waive his right to 15-day notice, and he and his counsel confirmed that waiver during the hearing. (Tr. at 7-9.) The Government offered exhibits (GE) 1 and 2, which were admitted without objection. Department Counsel also submitted a request for administrative notice, with eight exhibits attached in support of the request. The request was marked Hearing Exhibit (HE) II, and the supporting documents were marked Administrative Notice (AN) exhibits I through VIII. Applicant testified on his own behalf, and submitted Applicant's Exhibits (AE) A through E, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on May 23, 2008.

Findings of Fact

Applicant is a 57-year-old employee of a defense contractor. He was born and raised in Afghanistan. (GE 1 at 1.) Applicant's mother died when he was about 18 months old. He was raised solely by his grandmother until he was four years old, when the two of them moved back to live with his father. Shortly thereafter, his father married his step-mother. Over the next 18 years, Applicant's five half-sisters and four half-brothers were born. Although Applicant lived in the family home until leaving for college, he was mainly cared for by his grandmother and was never close with his step-mother or her children. In his Answer, Applicant admitted the truth of the allegations in SOR ¶¶ 1.a through 1.d, concerning his step-mother and half-siblings, but clarified that one of his two half-brothers living in Germany is a German citizen. During the hearing he also reported that one of his half-sisters, a married housewife, now lives in Pakistan. (Answer; GE 1 at 4-5, Tr. at 130, 158.)

After his sophomore year of college, Applicant's university was shut down due to student unrest and rioting. Because he spoke English well, he was hired to work in the U.S. Embassy. After working there for a few years, he was arrested by the Afghan secret police and charged with spying for the U.S. He was released after a couple of weeks on condition that he promise to no longer work for the Americans and not to leave Kabul. He had previously been accepted at an American university to finish his education, and had sent some money to a bank account in the U.S. in preparation. When he told people at the U.S. embassy about his arrest and concerns over further trouble, they accelerated approval of his student visa, and he left to come to the United States permanently in March 1973. The only people who knew he was leaving for good were his father and grandmother. (Tr. at 99-111.)

Applicant finished college in 1976, and married his wife in October of that year. She is a U.S. citizen by birth. (GE 1 at 2, 3.) He became a naturalized U.S. citizen in 1983. He worked as a banker until losing his job in a reorganization in about 1990. He then worked for two other companies in the same area until 1996, when he moved to the New York city metropolitan area in search of employment. During those twenty years, he was active in several community organizations. While searching for a better job, a process hampered by his lack of computer skills, he worked as a limousine driver. He was working, and personally witnessed, the terrorist attacks on the World Trade Center on September 11, 2001. He was horrified, and promptly called the FBI to offer any possible assistance he could with his knowledge of Afghanistan. He also called several days later to report a suspicious passenger he was hired to take to the airport. Eventually, he was contacted and recruited by his present employer to act as an interpreter/translator/cultural advisor for U.S. military forces in Afghanistan, starting in 2004. He was granted an interim security clearance and worked with significant classified information in the performance of his duties. He always handled sensitive and classified information properly and in the best interest of the United States and U.S. forces. (Tr. at 33-35, 56-58, 97-98, 123-127.)

Without including too many details in this opinion, I will summarize that his performance in Afghanistan, in direct support of numerous major combat operations and community relations efforts, has been superior. As a result, he has been personally requested to remain in a very important area supporting sequential rotations of special forces units. (Tr. at 60-66.) His commander and operations officer from the unit he supported that most recently returned to the U.S. both testified to his demonstrated dedication, loyalty, and trustworthiness during intensive combat operations. His commander testified, “[Applicant] is one of the most loyal and trustworthy Americans and individuals I have ever worked with before.” This colonel has worked overseas with interpreters and advisors throughout his 20 year career, and found Applicant to be, “by far the most effective and loyal of those individuals.” (Tr. at 31-32.) He frequently accompanied members of his unit into combat operations at great personal risk, and was injured during one such operation. His importance to the commander was so high that he eventually limited Applicant’s exposure to combat to minimize the risk of losing an irreplaceable asset. (Tr. at 44-45, 49-53.) His former operations officer, with whom he also worked very closely for nine months, described him as “a patriot ... more American than myself. He loves the United States ... [and] would do nothing that would ... harm this country, harm its efforts in Afghanistan, or absolutely positively put in harm’s way one of the soldiers in our units.” (Tr. at 58-59.) Both officers said his family members created no security concerns for them, and expressed full conviction that he would report any effort to influence or threaten his family members by any non-U.S. group to his commander immediately rather than respond unilaterally or compromise sensitive information in response to such acts. (Tr. at 41-46, 58.) He has received numerous awards and accolades from a succession of commanders he has served, and provided a substantial number of letters of recommendation commending his service and character. (Tr. at 66-67, 139-154; AE E.)

Applicant's father was apprehended by government forces in the early 1980s, during the Soviet occupation, and was never heard from again. Applicant presumes he was killed. He went to Pakistan twice during the early 1980s, and worked with the U.S. embassy there, to attempt to find what happened to his father and help him emigrate if possible. Applicant was unable to locate him, nor has his step-mother or any half-sibling ever seen his father again. He was able to assist one half-brother, who is now a German citizen and resident, emigrate during the second trip. (Tr. at 115-119.) He made an undetermined but small number of other trips to Afghanistan and Pakistan between 1983 and 2004. He did see his family members and contact them by telephone infrequently during those years. After his return to Afghanistan in 2004, he also visited them on several occasions, including once when the family held a memorial service to commemorate his father. These visits, since 2004, took place with the knowledge, permission, and encouragement of his commander, who was able to and did keep track of his whereabouts as a safety matter. (GE 2 at 4-5; Tr. at 35-39, 119-122.) Applicant and his family members belong to a minority ethnic group in Afghanistan that live in an area away from Taliban influence and support the coalition. None of them has any connection to either the Afghan government or the Taliban. (Tr. at 49, 132-133.) While they, like everyone in Afghanistan, is at risk of violence or terrorist attack, Applicant's commander assessed that any additional risk to his family from his status as an American fighting with government and coalition forces was marginal, and was never a concern that Applicant expressed in any way. (Tr. at 48-49.) Applicant owns no property and has no financial assets in Afghanistan. (Tr. at 136.) He never discusses his work with his family members. His testimony during the hearing was forthright and credible.

I have taken administrative notice of the facts set forth in HE II, including the present dangerous nature of Afghanistan and the ongoing fighting there between Afghan government and coalition forces against the Taliban. There is no evidence of Afghan government espionage activity directed toward their U.S. or coalition allies in this fight. That government is working to establish a functional democracy.

Policies

When evaluating an Applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used to evaluate an Applicant's eligibility for access to classified information.

These 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 over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 “Any doubt concerning personnel being considered for access to classified information 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, “The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Section 7 of Executive Order 10865 provides that “Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

A person applying for access to classified information seeks to enter 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 classified information.

Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline B, Foreign Influence

AG ¶ 6 expresses the security concern regarding foreign influence:

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.

AG ¶ 7 describes conditions that could raise a security concern and may be disqualifying. Department Counsel argued that the evidence in this case established two of them:

(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.

Applicant has had some contact over the years with his step-mother and half-siblings. Since he began working for U.S. forces in Afghanistan in 2004, he has seen those who are presently in Afghanistan (step-mother, two half-brothers, and four half-sisters) several times, with full command knowledge and permission on each occasion. His contact with them creates a marginally heightened risk to their potential subjection to exploitation, pressure or coercion. Because they belong to an ethnic minority that is strongly opposed to the Taliban, they would not willingly assist in any efforts to hurt U.S. or coalition interests. Applicant's connections to his family in Afghanistan could create a potential conflict of interest between his security obligations and his desire to help them only in a situation wherein they were taken hostage or otherwise threatened with harm if he did not cooperate. None of them have any government connection or other position in which they could otherwise benefit from his provision of sensitive information or technology. Thus, under either disqualifying condition, security concerns in this case would arise in connection with the potential that hostile forces might seek protected information from Applicant by threatening harm to his family members in Afghanistan.

AG ¶ 8 provides conditions that could mitigate security concerns. Those with potential application in this case are:

(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;

(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;

(d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority; and,

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country.

The positions and activities of Applicant's family members in Afghanistan involve no government or military connection and they would have no interest in acquiring protected information. Only their physical presence creates the potential that their interests could be threatened to the point that Applicant would confront a choice between their interests and those of the U.S. Because they and their community are strongly opposed to forces hostile to U.S. interests in Afghanistan, the likelihood of such a situation is substantially reduced. The Afghan government is a U.S. ally that does not pose an intelligence risk through Applicant's family members, who are supporters of the Afghan and coalition efforts to defeat the Taliban and establish a working democracy.

Applicant produced very significant evidence establishing mitigating condition 8(b). He does feel some loyalty to his family members in Afghanistan, but far less than he would to any full-blooded relatives. By his actions in support of U.S. operations there, and by the testimonials of many experienced officers with whom he has served, Applicant's relationships and loyalties in and toward the U.S. are so deep and longstanding that he would absolutely resolve any conflict of interest in favor of the U.S. interest. He moved permanently to the U.S. in 1973, and became a citizen in 1983. He has willingly and frequently risked his own life in combat and combat support operations, and testified convincingly that he would resolve any threat to his family members by immediately reporting it to his military superiors. He knows he could do nothing by himself that would actually benefit any relative who might be held or threatened by hostile forces, so the compromise of classified information would not benefit their interest in any event.

Applicant and his counsel attempted to establish mitigating condition 8(c) through description of his contacts and communications with his family members as infrequent. In addition to the presumption that contact with family members is not casual, I find that the number of ongoing contacts and communications with his family members over the 35 years since he left Afghanistan do not establish casual and infrequent contacts under governing Appeal Board case law. However, all of Applicant's contacts and activities with his relatives since he returned to Afghanistan and began working with sensitive information have been approved, and even encouraged, by his unit commander and security personnel. He has properly reported all unofficial foreign contacts, and there have been no requests or threats to report. This establishes mitigation under AG ¶¶ 8(d) and (e).

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 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) 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(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense 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. Although this case concerns Guideline B, and security concerns do not arise from any questionable conduct by Applicant, several factors bear further analysis. He is a mature and serious individual whose dedication to supporting U.S. national security interests is evident from his demeanor and his actions. After personally witnessing the September 11 terrorist attacks on New York City, Applicant was motivated, by patriotism and a strong desire to serve U.S. national interests, to volunteer for service as an interpreter and cultural expert in support of U.S. forces in Afghanistan. He has done so, at great personal risk, for some four years and is highly sought after by unit after unit based on his expertise and demonstrated dedication to furthering U.S. interests there. While holding an interim clearance, he carefully safeguarded sensitive information and complied diligently with all security procedures.

The Appeal Board has recognized an exception to the general rule that administrative judges are not required to assign an applicant's prior history of compliance with security procedures and regulations significant probative value in Guideline B cases. This exception arises, "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 national security." ISCR Case No. 05-03846 at 6 (App. Bd. Nov. 14, 2006) *citing* ISCR Case No. 04-12363 at 2 (App. Bd. July 14, 2006). While not recited in detail in my findings of fact, for reasons of privacy and security, this record is replete with exactly such credible independent evidence, which has been considered in reaching my decision.

On balance, Applicant presented sufficient evidence to fully mitigate reliability and trustworthiness security concerns arising from the citizenship status and residence of his step-mother and half-siblings in Afghanistan, Pakistan and Germany. Overall, the record evidence leaves no doubt as to Applicant's present eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising under Guideline B.

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
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant

Conclusion

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

DAVID M. WHITE
Administrative Judge