



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



In the matter of:)
)
) ISCR Case No. 13-00912
)
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: Jennifer Kies Mammen, Esq.

03/31/2014

Decision

CURRY, Marc E., Administrative Judge:

Applicant mitigated the security concern generated by his relationship to his family members who live in Israel. Clearance is granted.

Statement of the Case

On September 19, 2013, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) detailing security concerns under Guideline B, Foreign Influence. 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 adjudicative guidelines (AG) effective within the DoD for SORs issued as of September 1, 2006.

Applicant answered the SOR on October 23, 2013, admitting all of the allegations, and requested a hearing. I received the case assignment on January 10, 2014. On

January 29, 2014, the Defense Office of Hearings and Appeals (DOHA) issued a notice of appeal scheduling the hearing for February 20, 2014. I held the hearing as scheduled. During the hearing, I received two Government exhibits, marked as Government Exhibit (GE) 1 and 2, and 13 Applicant Exhibits marked as Applicant Exhibits (AE) A through M. DOHA received the hearing transcript (Tr.) on March 5, 2014.

Evidentiary Rulings

Department Counsel asked that I take administrative notice of Hearing Exhibits (HE) I through XIII. After considering Applicant's objections, I granted Department Counsel's request with respect to HE I through VI, and HE VIII, and reserved judgment on HE VII and HE IX through XIII. (Tr. 32)

HE VII is a settlement order (the Order) related to a U.S. company that was accused of trading with Israel and two other countries without obtaining the required licenses from the United States Department of Commerce Bureau of Industry and Security (BIS). The Order memorializes an agreement between BIS and the U.S. company in which the company neither admitted nor denied the allegations, but agreed to accept a civil penalty, suspended for one year, so long as it committed no additional violations. HE IX through XIII are BIS press releases summarizing settlement of civil and criminal charges involving companies that either illegally or improperly exported sensitive technology to Israel.

Administrative notice is the means by which agencies make factual findings without the adversarial presentation of evidence. (*See McCormick on Evidence* § 339 at 1029 (3d ed. 1988)) Facts that are received in this manner are considered legislative facts. Legislative facts are established truths, facts, or pronouncements that do not change from case to case, but apply universally. They form the basis upon which adjudicative facts are evaluated. (*See, e.g., Brown v. Board of Education*, 347 U.S. 483, 494 (1954), *Baker v. Carr*, 369 U.S. 186 (1962), and *Neeld v. National Hockey League*, 594 F. 2d, 1297, 1300 (9th Cir. 1979))

According to the Appeal Board, "official pronouncements by the President, State Department, Department of Defense, or other appropriate federal agency on matters of national security are equivalent to legislative facts for the purposes of DOHA adjudications in that they bind the judge and are not subject to refutation." (*See ISCR Case No. 02-04786* at n.6 (App. Bd. Jun. 27, 2003) In order for a fact to be legislative, it must concern an issue over which reasonable people could not disagree. (*de la Llana-Castellon v. U.S. Immigration and Naturalization Service* (16 F. 3d 1093, 1097, C.A. 10, 1994 (February 16, 1994)).

The information of which I took administrative notice consisted of copies of various political, military, and economic agreements between Israel and the United States over the years. Also, it consisted of agency reports and presidential announcements covering topics ranging from general information about travel to Israel,

to information regarding the current security/intelligence profile of Israel vis a vis the United States.

Conversely, the hearing exhibits, on which I reserved judgment, do not analyze or discuss the relationship between Israel and the United States. Instead, these exhibits are simply copies of press releases or court orders regarding companies that settled export violation cases with BIS. Although each press release sets forth cases involving technology being exported to Israel, HE X¹ is the only one that involved an Israeli. Also, these press releases do not indicate that the companies involved were attempting to help Israel, or whether they were driven to circumvent the BIS regulations out of profit motive. Consequently, I decline to take administrative notice of any of the information encapsulated within the hearing exhibits, upon which I reserved judgment, other than HE X.

Findings of Fact

Applicant is a 43-year-old married man with two children, ages three and one. He is a licensed pilot who works for a commercial airline. (Tr. 95) He also owns a company that specializes in integrating aerial technology software for various government agencies. (Tr. 97-98) He requires a security clearance for the latter position. (Tr. 10)

Applicant was born and raised in Israel. When Applicant was ten, his father left his family, leaving Applicant's mother indigent, and unable to support their family. (Answer at 2) Consequently, Applicant's mother sent him to live at a kibbutz that had a program with children from "broken" families. (Tr. 87, 121) Applicant spent the remainder of his childhood there. (Tr. 88) While living at the kibbutz, Applicant only saw his mother once every few months, and rarely talked to her because the kibbutz had no phone service. (Tr. 121)

Applicant finished high school in 1989, then completed his mandatory military service. After finishing his stint in the Israeli military in 1992, Applicant moved to the United States. (Tr. 90) He enrolled in flight school and took a job as a security guard at the Israeli Embassy. (Tr. 90) He was a contract employee, not an employee of the Israeli government. (GE 2 at 44)

Applicant graduated from flight school in 1996. (Tr. 90) He then left his employment with the Israeli Embassy and took a job with an airline company. (Tr. 91) Shortly after getting this job, Applicant was furloughed. (Tr. 98) Because the furlough coincided with the expiration of Applicant's green card, he returned to Israel, earned an Israeli pilot's license, and began job-hunting for positions in both Israel and the United States. (Tr. 91, 93)

¹HE X concerns an Israel man who was charged with concealing an illegal transfer of an infrared camera from the U.S. Commerce Department's Bureau of Export Administration.

In 1998, after getting a job with another U.S. airline company, Applicant returned to the United States. (Tr. 93) He worked for this airline through 2004, before taking a job with the airline company with whom he works currently. (Tr. 95) Since working for his current employer, Applicant has helped three friends, U.S. citizens and former coworkers from the company that downsized in the mid-1990s, get jobs with his current employer. (Tr. 95) He became a naturalized U.S. citizen in 2005. (GE 1 at 7)

In 2004, Applicant started a side business selling aerial photography (Tr. 96). Initially, he worked with realtors, then increasingly became interested in geospatial technologies. (Tr. 96) In 2007, Applicant started his current business. (GE 1 at 13) He develops software that supports multiple government agencies and allows them to share geospatial data more quickly and efficiently. (Answer at 3; Tr. 97)

Applicant's mother and two brothers are citizens and residents of Israel. Applicant's mother is an accountant who works at a local university. (Tr. 120) It is not affiliated with the Israeli government. Applicant speaks to his mother approximately once per week, and he sees her once per year when he travels to Israel. (Tr. 120, 125) Although Applicant and his mother currently are not estranged, their relationship is not normal "like other people's normal" because Applicant is still deeply hurt by his mother's decision to leave him at the kibbutz. He feels like she "gave up on [him] when he was ten." (Tr. 152)

When Applicant moved to the kibbutz, his younger brother was five years old, and his youngest brother was one year old. Because they were not raised together, they do not have a close relationship. The brother who is five years younger than Applicant is a policeman. (Tr. 125) Applicant does not talk to him regularly, and he last saw him at their youngest brother's wedding two years ago. (Tr. 125; Answer at 10)

Applicant's youngest brother is a software programmer. (Tr. 122) He does not work for the Israeli government. They communicate by SKYPE once every few months. (Tr. 123) Applicant's mother and youngest brother visited Applicant in the United States approximately a year ago when Applicant's youngest child was born. Applicant neither receives, nor provides financial support from any of his family members. (Tr.118).

Life on the kibbutz was tough. There was a social hierarchy among the children there. They treated anyone who was not born on the kibbutz as "B scale citizens." (Tr. 151) Nevertheless, Applicant remains in touch with the people at the kibbutz who raised him. Applicant speaks to his "kibbutz mom" and her daughter approximately once per year. (GE 2 at 25) He only speaks to his "kibbutz brothers" when he visits Israel. (GE 2 at 25) His "kibbutz father" is deceased. (GE 2 at 25)

Applicant has several Israeli friends with whom he remains in touch. These contacts include his mentor, a dual U.S./Israeli citizen who owns a flight school in Israel and a flight school in the United States. (Tr. 129) This friend splits his time between Israel and the United States. Applicant talks to him a few times per year, and last saw him a year ago. (Tr. 130, 135) Applicant is also friends with this gentleman's son, a

doctor who lives in northern Israel. (Tr. 130) Applicant has not talked to him in several years.

Applicant is acquainted with an Israeli citizen and resident who works in the airline business. Applicant talks with him a few times per year. Over the years, this friend visited Applicant in the United States once, and Applicant visited him in Israel twice. (GE 2 at 25)

Applicant's business generates approximately \$250,000 of revenue annually. (Tr. 147) His home is valued at more than two million dollars, and he has \$250,000 in a 401k plan. (Tr. 147) Applicant has no assets in Israel. When his grandfather died in the mid-1990s, his mother informed him that he could possibly receive money through his grandfather's estate. Applicant never pursued this possibility. (Tr. 117)

Applicant is active in a national professional organization for practitioners in the geospatial technology field. (Tr. 97) Several personal and professional acquaintances vouch for his integrity, his excellent job performance, and his good character, including two retired naval officers, and an air force officer. (AEs A-C, J)

Israel is a parliamentary democracy with strong historic and cultural ties with the U.S. (HE II at 1; HE VI at 2). Commitment to Israel's security has been a cornerstone of U.S. Middle East policy since Israel's inception (HE XXIX at 3; HE XXXI at 1). Both countries have a mutual interest in a peaceful, secure Middle East. On July 27, 2012, President Obama signed the United States-Israel Enhanced Security Cooperation Act. (HE XXX) The goal of this legislation is to strengthen the military edge that Israel enjoys over its regional enemies. (*Id.*)

Israel aggressively targets sensitive U.S. technology. (HE VI at 38) There have been some cases of U.S. government employees who have been prosecuted and convicted of spying against the U.S. for Israel. (Exhibit VI at 39) In 1998, Israel acknowledged that one of these individual's had been its agent. (HE VI at 39)

The threat of terrorist attacks is growing in ungoverned or minimally governed areas near Israel's borders with Syria, Lebanon, the Sinai Peninsula, and Libya. (HE VI at 17) However, some unconventional security threats have been reduced because of factors such as heightened security measures vis a vis Palestinians, missile defense systems, and cyberwarfare capabilities. (HE VI at 17)

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.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied together with the factors listed in the adjudicative process. According to AG ¶ 2(c), the entire process is a conscientious scrutiny 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 “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.”

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 applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion for obtaining a favorable security decision.

Analysis

Guideline B, Foreign Influence

Under this guideline, “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 the U.S. interests, or is vulnerable to pressure or coercion by any foreign interest” (AG ¶ 6). Moreover, “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” (*Id.*).

Israel aggressively targets protected or sensitive U.S. technologies. Also, over the past 25 years, several people have been caught spying against the United States on Israel’s behalf. 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.”

The following mitigating conditions under AG ¶ 8 are potentially applicable:

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

Applicant has minimal contact with his younger brother, the policeman. He communicates with his brother, the software designer, a few times per year. They were never close because Applicant's brothers were both under six years old when his mother sent him to live at the kibbutz. Applicant's contact with his kibbutz family, friends, and acquaintances living in Israel is similarly casual and infrequent. AG ¶ 8(c) is applicable.

Applicant's relationship with his mother is not casual. Moreover, they talk and visit one another fairly regularly given that she lives overseas. AG ¶ 8(c) does not apply to Applicant's relationship with his mother.

There have been episodes of espionage conducted on Israel's behalf against U.S. interests. Although this limits the probative value of Israel's friendly relationship and its shared values with the United States, it does not nullify it. Israel is a democracy. It has no history of brute oppression or intimidation of its citizens. Although its foreign policy objectives are not always congruent with the United State's foreign policy objectives, they are by no means antithetical to those of the United States.

Of course, there are more subtle types of exploitation, inducement, manipulation, pressure, or coercion that a foreign country can exert on an individual with relatives or friends living in that country. Appeals to patriotism and ego, or the exploitation of a targeted person's natural desire to help loved ones or friends are tactics employed by friendly and hostile countries, alike. Although Applicant was raised in Israel, his childhood memories of Israel are not fond. His mother "gave up on him when he was ten," sending him to live on a kibbutz where he was treated like a "B scale citizen" for the next ten years. Conversely, once Applicant moved to the United States, he successfully pursued his dream of becoming an aviator, finishing flight school, nurturing his interest in geospatial technology, and parlaying it into a successful business that enabled him to become wealthy and respected in the field as a subject-matter expert. Also, since moving to the United States, Applicant has gotten married, started a family, and purchased a home.

With the exception of three years in the mid-1990s, Applicant has been living in the United States since immigrating here in 1992. In that time, he formally renounced his Israeli citizenship and did not pursue a potential inheritance in Israel after the death of his grandfather. Under these circumstances, AG ¶¶ 8(a) and 8(b) apply.

Whole-Person Concept

Under the whole-person concept, 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.

Upon evaluating this case in the context of the whole-person concept, I conclude that it is highly unlikely that Applicant would sacrifice his job, the well-being of himself and his family, and his prestige by compromising classified or sensitive information for the benefit of a mother whom he feels abandoned him, or a country where he was treated like a second-class citizen. Applicant has mitigated the foreign influence security concern.

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.c:	For Applicant

Conclusion

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

MARC E. CURRY
Administrative Judge