



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



In the matter of:)
)
 [Redacted]) ADP Case No. 14-02496
)
 Applicant for Public Trust Position)

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

03/13/2015

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves trustworthiness concerns raised under Guidelines C (Foreign Preference) and B (Foreign Influence). Foreign preference concerns are mitigated, but foreign influence concerns are not mitigated. Eligibility for assignment to a public trust position is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on August 25, 2013, seeking eligibility for a public trust position. On July 18, 2014, the Department of Defense (DOD) sent him Statement of Reasons (SOR), citing trustworthiness concerns under Guidelines C and B. DOD acted under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DOD Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

Applicant answered the SOR on September 30, 2014, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on December 5, 2014, and the case was assigned to me on December 22, 2014. The Defense Office of Hearings and Appeals (DOHA) sent him a notice of hearing on

January 5, 2015, scheduling the hearing for January 28, 2015. Due to inclement weather, the hearing was postponed until January 30, 2015. I convened the hearing as rescheduled. Applicant waived the 15-day notice requirement of Directive ¶ E3.1.8. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Department Counsel requested that I take administrative notice of relevant facts about Israel. The request and supporting documentation are attached to the record as Hearing Exhibit (HX) I. I took administrative notice of the facts set out below.

Applicant testified and submitted Applicant's Exhibits (AX) A through C, which were admitted without objection. I kept the record open until March 3, 2015, to enable Applicant to submit additional documentary evidence. He timely submitted AX D through J, which were admitted without objection. Department Counsel's comments regarding AX D through J are attached to the record as HX II. DOHA received the transcript (Tr.) on February 18, 2015. The record closed on March 2, 2015.

Findings of Fact

Applicant is a 56-year-old consultant employed by a defense contractor since July 2013. He previously held public trust positions from May 2009 to June 2010 and October 2010 to May 2011, as a consultant for other government agencies.

Applicant was born in Israel and came to the United States in June 1987. He served in the Israeli Defense Forces (IDF) from 1978 to 1982, as an electronics technician in a tank factory. He was required to serve for four years instead of three because his military service was deferred for one year while he received electronics training. (GX 3 at 6.) He attended a U.S. university from June 1987 to June 1989 and received a bachelor's degree in electrical engineering and computer science. He became a U.S. citizen in June 1994 and obtained a U.S. passport in October 2005. He held an Israeli passport before becoming a U.S. citizen, and he renewed it in August 2006.

Applicant married a native-born U.S. citizen in August 1988, and they divorced in December 1989. He married his current spouse, also a native-born U.S. citizen, in June 1993. They have a 20-year-old daughter, an 18-year-old son, and a 13-year-old son, who are all native-born U.S. citizens. Their daughter went to Israel at age 18, became an Israeli citizen, and joined the IDF in January 2014 for a term of two years. She serves in the education branch of the IDF, teaching Israeli soldiers about Israeli history and Zionism. (Tr. 49.) Applicant has daily contact with his daughter. (GX 3 at 3.)

Applicant's mother was born in Germany and is a citizen and resident of Israel. His father was born in Poland, was a citizen and resident of Israel, and worked as a diamond cutter. He is deceased. (Tr. 51; GX 1 at 33.) Applicant's older brother, age 61, is a citizen and resident of Israel and works in an administrative position for a university in Israel. His brother served for 20 years in the IDF and retired as a major. (Tr. 60-61.) Applicant has weekly contact with his mother and monthly contact with his brother. (GX 3 at 3.)

Applicant and his mother are joint owners of a bank account in Israel, worth about \$40,000. He regards this bank account as his mother's property. He has joint ownership of the bank account to facilitate his access to it in the event of an emergency involving his mother. (GX 3 at 3.) Applicant has no other property or assets in Israel.

Applicant traveled to Israel to visit family in August 2003, August 2005, August 2008, August 2009, September 2009, August 2010, and November 2013. Each trip was for two weeks or less. (GX 1 at 41-49; Tr. 58-59.) For each trip, he used his Israeli passport to enter and exit Israel, because it made entry and exit easier. (GX 3 at 1.) Applicant and his family visited Israel again in December 2014, for their son's Bar Mitzvah. On this trip, Applicant entered Israel with his U.S. passport and exited with his Israeli passport. (Tr. 52-53.) He has never used his Israeli passport to enter any country other than Israel. (Tr. 58.) Upon being advised of the trustworthiness concerns raised by his possession of an Israeli passport, Applicant surrendered his Israeli passport to his facility security officer (FSO) and obtained a letter from the Israeli Consul General's office permitting him to enter and exit Israel without an Israeli passport. (AX D through J.) He also asked the Consul General's office about the procedure for renouncing his Israeli citizenship, and he was advised that renunciation is a one-year process and is difficult to reverse. (AX C; AX G.)

The summary of a personal subject interview (PSI) in September 2009 indicates that Applicant was questioned about his loyalties to the United States and Israel, and he told the security investigator that he would never relinquish his Israeli citizenship and that he is an "Israeli first." He also told the investigator that the issue is moot because he could regain his Israeli citizenship even if he renounced it. (GX 4 at 1.)

At the hearing, Applicant testified that he did not remember making the statement about being "Israeli first," but that he must have said it if it was in the PSI summary. When asked if he still felt the same way, he testified, "I feel that I have an allegiance to both countries, and I would take away that statement, Israel first." (Tr. 65.)

The summary of a second PSI in September 2013 reflects that Applicant said that he holds no allegiance to one country over another and that his allegiance to Israel is such that he would give his life to protect Israel. (GX 3 at 1.) He was not questioned about this statement at the hearing and did not elaborate on it.

Applicant's rabbi, who has known him and his family since 1992, regards him as a devoted family person, who is hard working and committed to maintaining the highest standards of behavior in his personal and professional life. The rabbi has found Applicant trustworthy and dependable, and he believed Applicant can be trusted to never reveal sensitive information to unauthorized recipients. His observation of Applicant has led him to conclude that Applicant's loyalty to the United States is unquestionable and his trustworthiness is exceptional. (AX A.)

An active-duty lieutenant colonel in the U.S. Air Force, who has known Applicant for most of his life, is aware of Applicant's family connections in Israel, including his

daughter's service in the IDF. He believes that Applicant is a person of high moral character who is unqualifiedly and deeply loyal to the United States. (AX B.)

Israel is a parliamentary democracy with a diversified, technologically advanced economy. Almost half of Israel's exports are high technology, including electronic and biomedical equipment. Israel is a close ally of the United States, and the United States is its largest trading partner.

Israel has been identified as a major practitioner of industrial espionage against U.S. companies. There have been instances of illegal export, or attempted illegal export, of U.S. restricted, dual-use technology to Israel. Israel has become a major global leader in arms exports, and the United States and Israel have periodically disagreed over Israeli sales of sensitive U.S. and Israeli technologies to third-party countries, including China and Russia.

The U.S. and Israel have close cultural, historic, and political ties. They participate in joint military planning and training, and have collaborated on military research and weapons development. Commitment to Israel's security has been a cornerstone of U.S. Middle East policy since Israel's creation in 1948.

Israel generally respects the rights of its citizens. When human-rights violations have occurred, they have involved Palestinian detainees or Arab-Israelis. Terrorist suicide bombings are a continuing threat in Israel, and U.S. citizens in Israel are advised to be cautious.

Israel considers U.S. citizens who also hold Israeli citizenship or have a claim to dual nationality to be Israeli citizens for immigration and other legal purposes. U.S. citizens visiting Israel have been subjected to prolonged questioning and thorough searches by Israeli authorities upon entry or departure.

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3. The standard that must be met for assignment to sensitive duties is that the person's loyalty, reliability, and trustworthiness are such that assigning the person to sensitive duties is "clearly consistent with the interests of national security." Regulation ¶ C6.1.1.1. DOD contractor personnel are entitled to the procedural protections in the Directive before any final unfavorable access determination may be made. Regulation ¶ C8.2.1.

A person who seeks access to sensitive information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information.

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the AG. These guidelines 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. The administrative judge's overarching 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.

The protection of the national security is the paramount consideration. Under AG ¶ 2(b), "[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security." The Government must present substantial evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. 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 national security to grant or continue eligibility for access to sensitive information.

Analysis

Guideline C, Foreign Preference

The SOR alleges that Applicant obtained an Israeli passport in August 2006 after becoming a U.S. citizen in 1994 (SOR ¶ 1.a), and that he used his Israeli passport for international travel on "numerous occasions" (SOR ¶ 1.b). The concern under this guideline is set out in AG ¶ 9: "When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States."

Dual citizenship standing alone is not sufficient to warrant an adverse trustworthiness decision. ISCR Case No. 99-0454 at 5, 2000 WL 1805219 (App. Bd. Oct. 17, 2000). Under Guideline C, "the issue is not whether an applicant is a dual national, but rather whether an applicant shows a preference for a foreign country through actions." ISCR Case No. 98-0252 at 5 (App. Bd. Sep. 15, 1999).

The trustworthiness concern under this guideline is not limited to countries hostile to the United States. "Under the facts of a given case, an applicant's preference, explicit or implied, even for a nation with which the U.S. has enjoyed long and peaceful relations, might pose a challenge to U.S. interests." ADP Case No. 07-14939 at 4 (App. Bd. Mar. 11, 2009).

Under AG ¶ 10, a disqualifying condition may arise from:

(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to: (1) possession of a current foreign passport . . . ; and

(d) any statement or action that shows allegiance to a country other than the United States

Applicant's retention and renewal of his Israeli passport after becoming a U.S. citizen establishes AG ¶ 10(a). His use of his foreign passport for travel to Israel does not trigger a separate disqualifying condition under this guideline, but it falls under the general category of exercising "any right, privilege or obligation of foreign citizenship." His statements during his PSIs in September 2009 and September 2013, expressing equal allegiance to the United States and Israel, establish the disqualifying condition in AG ¶ 10(d). His surrender of his Israeli passport to his FSO establishes the mitigating condition in AG ¶ 11(e): "the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated."

Guideline B, Foreign Influence

The SOR alleges that Applicant's mother is a dual citizen of Germany and Israel and resides in Israel (SOR ¶ 2.a); his daughter is a dual citizen of the United States and Israel and resides in Israel (SOR ¶ 2.b); and his brother is a citizen and resident of Israel (SOR ¶ 2.c). The trustworthiness concern under this guideline is set out in AG ¶ 6 as follows:

Foreign contacts and interests may be a [trustworthiness] 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.

Applicant's connections to Israel raise three disqualifying conditions under this guideline:

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(e): a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation.

AG ¶¶ 7(a) and 7(e) 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 or financial interests subject to a foreign government. 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).

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 Israeli citizenship of Applicant's mother, daughter, and brother, all of whom reside in Israel, coupled with the Israeli military connections of Applicant's daughter and brother, are sufficient to establish the "heightened risk" in AG ¶ 7(a) and raise the potential conflict of interest in AG ¶ 7(b). Applicant's interest in a joint bank account with his mother is sufficient to raise AG ¶ 7(e).

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;

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; and

AG ¶ 8(f): the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

AG ¶ 8(a) is not established. Three members of Applicant's immediate family are citizens and residents of Israel, and two have military connections to Israel. These family ties, coupled with Israel's record of industrial espionage, preclude a finding that it is unlikely that Applicant will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the United States.

AG ¶ 8(b) is not established. In terms of allegiance, Applicant has one foot in the United States and one foot in Israel. His responses during the PSIs reflect that he does not favor one country over the other. While he has strong ties to the United States, he also has strong ties to Israel. I am not convinced that he would resolve any conflict of interest in favor of U.S. interests.

AG ¶ 8(c) is not established. Applicant has frequent contact with his daughter and mother, and less frequent contact with his brother. He has not overcome the rebuttable 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(d) is established. While \$40,000 is a substantial sum, Applicant regards this money as his mother's, and he has joint ownership only to facilitate access to the money in the event his mother is unable to do so. Furthermore, there is no evidence that the Israeli government uses the financial assets of its citizens as leverage to gain industrial and proprietary information.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a public trust position 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 public trust position 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 Guidelines C and B in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant was candid and sincere at the hearing. He has twice held public trust positions, apparently without incident. He has a reputation among friends and associates as a loyal American. His attachment to Israel falls short of a foreign preference, because he has made it clear that he has no preference for either country. However, his divided allegiances preclude a finding that he can be expected to resolve any conflict of interests in favor of the United States. After weighing the disqualifying and mitigating conditions under Guidelines C and B, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the trustworthiness concerns based on foreign preference, but he has not mitigated the concerns based on his vulnerability to foreign influence. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with national security to grant him eligibility for a public trust position.

Formal Findings

Paragraph 1, Guideline C (Foreign Preference):	FOR APPLICANT
Subparagraphs 1.a-1.b:	For Applicant
Paragraph 2, Guideline B (Foreign Influence):	AGAINST APPLICANT
Subparagraphs 2.a-2.c:	Against Applicant

Conclusion

It is not clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for a public trust position is denied.

LeRoy F. Foreman
Administrative Judge