DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 15-02404
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: *Pro se*

05/06/2016

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Decision

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HESS, Stephanie C., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence) and Guideline C (Foreign Preference). Applicant's close family ties and financial interests in Israel, and his possession of a valid Israeli passport preclude eligibility for access to classified information. Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on November 9, 2014. On November 24, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines B and C. The DOD CAF acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant answered the SOR on December 15, 2015, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on February

9, 2016, and the case was assigned to me on March 16, 2016. On March 23, 2016, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for April 13, 2016. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. I kept the record open until April 27, 2016, to enable Applicant to submit additional evidence. He timely submitted Applicant's Exhibit (AX) A, which I have admitted without objection. DOHA received the transcript (Tr.) on April 25, 2016.

Procedural Matters

On Department Counsel's motion and without objection, I amended the SOR by striking ¶ 2.d. Department Counsel also requested that I take administrative notice of certain facts about Israel. Without objection, I approved the request. The relevant facts are highlighted in the Findings of Fact section, below.

Findings of Fact

The SOR alleges that Applicant possesses a valid Israeli passport which he has used for travel to Israel since becoming a U.S. citizen. The SOR also alleges that his parents and two brothers are citizens and residents of Israel; one brother is in the Israel Defense Forces (IDF) inactive reserves; and that Applicant's wife and four children are dual citizens of Israel and the United States. In his Answer, Applicant admitted each of these allegations. Applicant's admissions in his Answer are incorporated in my findings of fact.

Applicant is a 53-year-old senior engagement manager employed by a defense contractor since 2014. He attended college in Israel and received a bachelor's degree in computer science in 1989. (Tr. 25.)

Applicant was born in Israel. His family moved to another country, where he spent his formative years. He returned to Israel and entered the military. He was on active duty in the IDF from 1980 until 1984, and remained in the inactive reserves until approximately 1992. (Tr. 50.) Applicant and his wife met while serving together in the IDF, and married in 1985. They both attended officer's school and achieved the rank of lieutenant. Applicant's wife was released from the inactive reserves in 1988. (Tr. 50-51.)

Due to Applicant's employment opportunities, he, his wife, and their children moved abroad from Israel and lived in several different countries. However, three out of four of the children were born in Israel. (GX 1.) From 1992 until 1995, they lived in the United States. In 1995, they returned to Israel with the intention of remaining there. (Tr. 26.) Their plans changed, and they moved permanently to the United States in 2003. (Tr. 26.)

Applicant, his wife, and his children became naturalized U.S. citizens in 2010, but remain dual-citizens of Israel. (Tr. 30-31; GX 1.) He considers himself "a person of an international background, much more than an Israeli background." (Tr. 29.) In a few

months, he will have lived in the United States longer than in any other country, including Israel. Applicant considers the United States to be their home. (Tr. 30.) He and his wife own two houses in the United States. They have checking, savings, money market, retirement, and 401(k) accounts in the United States. (Tr. 51-52.) Applicant possesses a valid U.S. passport, which he uses for all international travel, except to Israel. (GX 1; Tr. 58.)

Applicant's parents are citizens and residents of Israel. He calls his mother once a week, and will sometimes speak with his father during those calls. He describes his relationship with his parents as close. (Tr. 48.) His parents visit Applicant and his family approximately every nine months, and stay an average of five weeks. (Tr. 56; Tr. 48.)

Applicant does not consider his relationship with either of his brothers to be close. (Tr. 45.) However, he does maintain contact with each of them, often through group e-mails shared among family members, and saw them both on his last trip to Israel in September 2015. (Tr. 45-46.) He and his two brothers will inherit his parents' estate. (Tr. 39.) His wife's sister is also a citizen and resident of Israel, and Applicant has contact with her in person and/or electronically approximately four times a year. (GX 1.)

Applicant and his wife currently have approximately $275,000 in a bank account in Israel, which came from an inheritance after his wife's father passed away. They are in the process of transferring the balance to an account in the United States. (Tr. 40-42.) Applicant maintains two savings accounts in Israel for his two minor children. The balance in each of the accounts is approximately $300 to $400. (Tr. 40-41.) He has a pension in Israel valued at approximately $150,000. His wife also has a pension in Israel. (Tr. 39-41.)

Applicant possesses a valid Israeli passport that was issued in 2009 and expires in 2019. (GX 1.) He stated he is theoretically willing to surrender his Israeli passport, but needs to be able to travel to Israel to visit his parents. (Tr. 31-35) He views his Israeli passport as "just a travel document." (Tr. 58.) However, it is his understanding that, because he is an Israeli citizen, he is required by Israel to enter and exit Israel using only his Israeli passport. (Tr. 57-58.) Applicant traveled to Israel using his current Israeli passport twice in 2011 and once in 2015. (GX 1; Tr. 32.) He also possesses a valid Israeli identification card. (Tr. 42-43.)

After the hearing, Applicant contacted the Israeli consulate, who advised him not to surrender his passport to his facility security officer, and confirmed that Applicant could not enter Israel without it. Applicant has decided to retain his foreign passport. (AX A.)

Israel and the United States have historically strong bilateral relations which include cooperation on defense, and the United States has provided regular military support to Israel. However, there is significant documented history of classified information and controlled technologies being illegally imported by Israel. Illegal

technology transfers, even to private entities, are of substantial concern because government entities have learned to capitalize on private-sector acquisitions, potentially for use in weapons and other military applications.

In the past 30 years, there have been at least three cases in which U.S. government employees were convicted of disclosing classified information to Israel or of conspiring to act as an Israeli agent. Following the conviction of a former intelligence analyst and his wife for selling classified documents to the Israeli government, Israel granted the couple citizenship and later confirmed that the intelligence analyst was its agent. U.S. officials remain concerned about possible Israeli espionage.

All individuals entering or departing Israel are subject to security screening and may be denied entry or exit without explanation. U.S. citizen visitors have been subjected to prolonged questioning and physical searches and have been denied access to consular officers, lawyers, and family members. All electronic items must be declared upon entry and some travelers have had their laptop computers and other electronic equipment searched. Some travelers have also been required by Israeli security officials to grant access to personal e-mail and social media accounts. Travelers should have no expectation of privacy on any searched devices or accounts. Israeli citizens naturalized in the United States retain their Israeli citizenship and must enter and exit Israel using their Israeli passports.

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

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

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible

extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Guideline C, Foreign Preference

Under AG ¶ 9, the concern involving foreign preference arises "[w]hen an individual acts in such a way as to indicate a preference for a foreign country over the United States." Applicant's possession and use of his foreign passport raises this concern and also establishes the disqualifying condition at AG ¶ 10(a), "exercise of any right, privilege or obligation of foreign citizenship," to include "possession of a current foreign passport."

The foreign influence concern sets forth a number of conditions that could mitigate the concern. The following mitigating conditions are potentially relevant:

> AG ¶ 11(c): exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor;

AG ¶ 11(d): use of a foreign passport is approved by the cognizant security authority; and

AG ¶ 11(e): the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

I have considered each of the potentially mitigating conditions, and none of them applies. Because he cannot travel to Israel without his Israeli passport, Applicant is unwilling to surrender it.

Guideline B, Foreign Influence

The foreign influence security concern is explained at AG ¶ 6:

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.

Applicant's close relationship with his parents, ongoing contact with his brothers and sister-in-law, and financial interests in Israel, raise the foreign influence security concern.

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, (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 record evidence, to include the matters accepted for administrative notice, establish the following disqualifying conditions:

> 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
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> 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 (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 living under a foreign government.

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

Applicant's family ties in Israel, including his brother's ongoing military obligation, and his, his wife's and his children's dual citizenships; his financial interests, including his and his wife's pensions; Israel's history of espionage and the U.S.'s ongoing concern about espionage; and, the targeting, searching and detaining of U.S. travelers; are sufficient to establish the heightened risk in AG ¶¶ 7(a) and (e), and the potential conflict of interest in AG ¶ 7(b).

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;
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> AG ¶ 8(d): the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority; 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.

An applicant with close family members and interests in a foreign country faces a high, but not insurmountable hurdle in mitigating security concerns raised by such foreign ties. Furthermore, an applicant is not required "to sever all ties with a foreign country before he or she can be granted access to classified information." ISCR Case No. 07-13739 at 4 (App. Bd. Nov. 12, 2008). However, what factor or combination of factors will mitigate security concerns raised by an applicant with family members in a foreign country is not easily identifiable or quantifiable. ISCR Case No. 11-12202 at 5 (App. Bd. June 23, 2014). An administrative judge's predictive judgment in these types of cases must be guided by a commonsense assessment of the evidence and consideration of the adjudicative guidelines, as well as the whole-person factors set forth in the Directive. A judge's ultimate determination must also take into account the overarching standard in all security clearance cases, namely, that any doubt raised by an applicant's circumstances must be resolved in favor of national security. AG ¶ 2(b).

I have considered all the foreign influence mitigating conditions and, based on the record evidence, none apply. Applicant's close relationship with his parents is understandable and commendable. However, it also could create circumstances where Applicant could be placed in a position of having to choose between the interests of his parents and those of the United States. He has already chosen to retain his Israeli passport at the expense of his security clearance. Applicant's close ties to his parents

create a conflict of interest under which he could conceivably resolve such conflict in a way that would be harmful to the United States.

However, this adverse finding is "not a comment on Applicant's patriotism but merely an acknowledgment that people may act in unpredictable ways when faced with choices that could be important to a loved-one, such as a family member." ISCR Case No. 08-10025 at 4 (App. Bd. Nov. 3, 2009).

Applicant testified credibly that he is in the process of transferring the $275,000 inheritance proceeds to an account in the United States. However, he remains eligible for a pension currently valued at $150,000. He maintains savings accounts in Israel for two of children. While the pension and savings accounts may not represent the majority of Applicant's assets, the value is significant and could be a point of vulnerability for him.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

> (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

I have incorporated my comments under Guidelines B and C in my whole-person analysis and I have considered the factors in AG ¶ 2(a). Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but I have also considered the following:

Through his testimony, it is clear that Applicant is a man of integrity and loyalty. He testified openly and honestly about his family ties in Israel. His unwillingness to surrender his Israeli passport is based solely on the fact that, without it, he would be unable to visit his parents. In any other setting, his loyalty to his parents would only be viewed as an attribute. However, in the security clearance arena, such strong bonds necessarily raise concerns.

After weighing the disqualifying and mitigating conditions under Guidelines B and C, and evaluating all the evidence in the context of the whole person, I conclude

Applicant has not mitigated the security concerns raised by his foreign family connections and his possession of a foreign passport. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline C (Foreign Preference):	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant
Paragraph 2, Guideline B (Foreign Influence)	AGAINST APPLICANT
Subparagraphs 1.a – 1.c and 1.e:	Against Applicant
Subparagraph 1.d:	Withdrawn

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Stephanie C. Hess
Administrative Judge