DATE: April 15, 2002

In Re:

SSN: -----------

Applicant for Security Clearance

ISCR Case No. 01-06266

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Marc Curry, Esq., Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4), issued a Statement of Reasons (SOR), dated November 5, 2001, to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. The SOR was based on foreign influence (guideline B) related to Applicant maintaining a relationship with a resident citizen of Israel, and on involvement in outside employment or activities (guideline L) due to Applicant's consulting activities with two Israeli companies and one Canadian company.

On December 3, 2001, Applicant responded to the allegations set forth in the SOR and requested a decision based on the written record. The Government requested a hearing before a DOHA Administrative Judge, and the case was assigned to me on January 21, 2002.[(1)] Pursuant to formal notice dated January 31, 2002, the hearing was scheduled for February 26, 2002. On February 23, 2002, Department Counsel requested a continuance of the hearing due to assigned Counsel's unavailability on February 26, 2002, due to a medical emergency. A brief continuance was granted, and on March 4, 2002, an amended notice was issued scheduling a hearing for March 12, 2002. At the hearing held as rescheduled, the Government submitted three exhibits and the Applicant five exhibits,[(2)] which were entered into the record. The Government called Applicant as an adverse witness and Applicant also testified on his behalf during the presentation of his case. With the receipt on March 20, 2002, of the transcript of the hearing, the matter is ripe for a decision.

FINDINGS OF FACT

After a thorough review of the evidence, and on due consideration of the same, I render the following findings of fact:

Applicant is a semi-retired,[(3)] self-employed businessman, who has worked as a paid consultant for a defense contractor

since 1999. Applicant seeks a Secret security clearance for his consulting duties with the defense contractor.

From June 1978 to August 1989, Applicant was employed in the business development division for a United States defense contractor. Applicant held a Secret security clearance for his defense-related work. In connection with his duties as sales manager for a computer product with military uses, Applicant had repeated contact over the eleven years with an Israeli citizen (hereinafter Mr. X), who was serving as the agent of record for the U.S. defense contractor's systems in Israel. At the time of their initial acquaintance, Mr. X was a senior pilot for Israel's national airline as well as an executive for a small Israeli trading company.[(4)]

In 1980, Applicant was given marketing and sales responsibility for the U.S. defense contractor's electronic warfare and naval airborne radar products. By then the principal owner of the small Israeli company,[(5)] Mr. X in about 1984/85 approached Applicant's employer about possible involvement in an Israeli aircraft modernization program which had a radar component. The U.S. defense contractor was subsequently awarded a contract in excess of $335 million with the Israeli government to build, design and deliver new radar for the modernization program. Applicant had extensive business-related contacts with Mr. X, which included written and telephonic business correspondence as well as in-person meetings with Mr. X, both in the United States and Israel. While on a business trip to Israel in 1984/85, Applicant and his spouse had dinner with Mr. X and his spouse.

In 1989, Applicant retired from his employment with the defense contractor, taking the option of early retirement. Since he no longer required access to United States classified information, his security clearance lapsed. Applicant worked for a United States company in Europe from August 1989 to March 1990, in charge of marketing the company's products in Europe. When the job did not work out, Applicant elected to start his own consulting business.

Since 1990, Applicant has acted as a self-employed business consultant in corporate sales, conducting client searches and analyzing potential markets for both United States and foreign firms. On an infrequent basis, Mr. X, in his capacity as principal for an Israeli company, continued to contact Applicant for business advice concerning United States companies which he felt had some potential in the Israeli market. Circa 1993, Mr. X inquired of Applicant whether he knew of a United States firm with "see through walls" radar technology which could detect the number as well as location of occupants in a building. Applicant put r. X in contact with a company with which he had a consulting agreement at the time. The proposal by the United States company was funded, and in October 1993, Applicant accompanied representatives from the United States company on a business trip to Israel to discuss the project. Applicant's expenses were paid for by the United States company. Applicant met with Mr. X in Israel on this trip.

Sometime prior to November 1993, Mr. X informed Applicant about a contract an Israeli electronics company had entered into with a European country's air force regarding development of a pod which would allow tracking of fighter pilots after training and inquired whether a United States company would be interested in representing the product for the Israeli electronics company in the United States. The United States company proposed by Applicant had sufficient interest to attend a demonstration in Israel in November 1993. Applicant accompanied employees from the United States entity to Israel, with his expenses paid for by the United States firm. Applicant advised the company against entering into any agreement with the Israeli company as the product was all "smoke and mirrors," and nothing came of the visit. Applicant met with Mr. X on this trip.

Seeking a device which would enable Israel to track stolen cars, Mr. X contacted Applicant for assistance in locating a firm which had beacons or other tracking devices that could be placed on automobiles. Applicant referred Mr. X to a small company in the United States engaged in the manufacture of small, ruggedized, button memory. In return, Applicant would receive a small percentage of any sales by Mr. X in Israel for the United States company. As of the hearing, Mr. X was serving as the current Israeli representative for the small United States manufacturer.[(6)]

In an effort to solve Israel's severe water shortage, Mr. X inquired of Applicant whether he knew of a company, not already involved in Israel, who had a water desalination system. Applicant referred Mr. X to a seawater desalination technology development company in the United States, which had retained him to assess markets, technology and potential investors. As of February 2002, the desalination company had given Mr. X the representation rights in Israel to their vacuum vapor distillation process.

On occasion since 1990, Mr. X has reciprocated with business referrals to Applicant. In 1994, the managing director of an Israeli company involved in the development of video conferencing approached Applicant while on a trip to the United States on the recommendation of Mr. X for assistance in establishing market penetration of their product in North America. The Israeli company retained Applicant as a consultant for a four-month period at a rate of $1,500.00 US per month. Applicant spent considerable time over those four months helping the foreign firm prospect for possible strategic alliances in the United States and develop the modus to supply its software to United States companies for inclusion in the latter's propriety products. In November 1994, Applicant traveled to Israel to meet with the team and study the product line. On Applicant's advice and with his assistance, the Israeli company established a United States subsidiary which eventually became publicly traded in the United States. Applicant submitted bills for expenses which the company refused to pay, and the relationship ended. Applicant has had no contact with the principals of this Israeli company since April 1995.

Mr. X asked Applicant if he would be interested in helping a small company record on DVD a tour of Christian churches in Israel. Applicant declined the offer. r. X requested Applicant to research companies reputed to have a great future in the aircraft industry with the aim of Mr. X becoming their representative in Israel. Since Mr. X has not offered to pay for his services, Applicant has told him he would not do much on his behalf.

Circa 2001, Applicant had a telephone conversation with Mr. X about the requirements for missile launch detection, discussing the unclassified technology in general terms. Under the assumption that everyone in Israel has military and/or law enforcement ties, Applicant discusses only information in the public domain. Applicant intends to continue this uncompensated, unofficial reciprocal business referral arrangement with Mr. X ("friends help friends").[(7)]

Applicant considers Mr. X to be a "business friend" with whom he exchanges yearly holiday greetings. In the last three years, their contact has been limited to ten or twelve messages by electronic mail, most of them concerning Mr. X's efforts to obtain tracking/beacon devices from a United States firm. As of February 2002, Applicant and the director of the desalination technology development company were continuing to work with Mr. X "with growing effectiveness." Applicant's business relationship is with the desalination technology company rather than with Mr. X.

Applicant has acted as a consultant for at least one foreign firm which was not Israeli. In 1993, the president/chief executive officer of a fledgling Canadian research company requested Applicant's assistance searching for potential business opportunities and products in the United States in the medical technology field. Over the next year, Applicant provided occasional consulting services without compensation but with the promise of future payment. In late 1994, Applicant demanded a formal consulting agreement. Paid only about $780.00 US per month for three months, Applicant incurred unreimbursed travel expenses which far exceeded that amount. In 1995, communications between the parties ceased without any formal agreement being reached. Applicant does not intend to reestablish any connection with this company as he considers the principals unethical.

Since 1999, Applicant has served primarily as a paid consultant for a United States defense contractor involved in missile detection. Requiring a Secret security clearance for his consulting duties, which include establishing contacts and researching opportunities for the company with the Department of Defense and United States military, Applicant completed a security clearance application on which he disclosed his representation in the United States for the Canadian company from 1992 to 1995. He listed his contacts with Mr. X's company in Israel and his sales of Israeli products in the United States on behalf of Mr. X's company from 1980 to February 2000.

Applicant is held in high regard by the President of the defense contracting company for which he has consulted since 1999.[(8)] This individual, who has worked with Applicant in some capacity since 1978, has observed Applicant to be extremely careful in the use and/or discussion of any classified or company proprietary data.[(9)] The co-founder/director of the desalination company became acquainted with Applicant when both were working (albeit for different companies) on electronics warfare systems programs prior to August 1989. Of the opinion that Applicant's marketing and technical contributions are of the highest caliber, he engaged Applicant's services to assist him in assessing markets for his new desalination technology company. Applicant has provided "great assistance on numerous occasions," and proven to be "especially helpful in introducing [him] to a [Mr. X] in Israel who had both market and investment interest in the new company."

A United States aerospace company in late 2001 was awarded a contract with a potential value of up to $206 million to supply and support three business jet aircraft to Israel for use as special electronic mission aircraft. Applicant understands Mr. X's company is the current agent of record for the United States firm in Israel and in his capacity as principal owner Mr. X held a prominent part in the company's negotiations with the Israeli government.

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. *See* Directive 5220.6, Section 6.3 and Enclosure 2, Section E2.2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior. See Directive 5220.6, Enclosure 2, Section E2.2.4.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

Foreign Influence

E2.A2.1.1. The Concern: A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

E2.A2.1.2. Conditions that could raise a security concern and may be disqualifying also include:

E2.A2.1.2.6. Conduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government

E2.A2.1.3. Conditions that could mitigate security concerns include:

None.

Outside Activities

E2.A12.1.1. The Concern: Involvement in certain types of outside employment or outside activities is of security concern if it poses a conflict with an individual's security responsibilities and could create an increased risk of unauthorized disclosure of classified information.

E2.A12.1.2. Conditions that could raise a security concern and may be disqualifying include any service, whether compensated, volunteer or employment with:

E2.A12.1.2.2. Any foreign national

E2.A12.1.2.3. A representative of any foreign interest

E2.A12.1.2.4. Any foreign, domestic, or international organization or person engaged in analysis, discussion, or publication of material on intelligence, defense, foreign affairs, or protected technology.

E2.A12.1.3. Conditions that could mitigate security concerns include:

None.

* * *

Under the provisions of Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. *See* Enclosure 2 to the Directive, Section E2.2.2.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of the Applicant, I conclude the following with respect to guidelines B and L:

Drawing on his experience and contacts gained from his employment with a defense contractor from June 1978 to April 1989, Applicant in 1990 started his own consulting business. In addition to entering into formal consultant agreements with United States firms, Applicant since 1990 has referred business to an Israeli national (Mr. X) with whom he has been acquainted since 1978. Applicant's assistance has ranged from responding to inquiries when contacted by Mr. X to linking the foreign businessman to United States companies capable of providing the product or service sought. In 1993, Applicant connected Mr. X with a United States company involved in "see through walls" radar technology. At the request of Mr. X, Applicant also identified for Mr. X a United States company with potential interest in fighter pilot training technology. As a direct result of Applicant's efforts, Mr. X serves as the agent representative in Israel for a United States manufacturer of small button memory. More recently, Applicant introduced Mr. X to a principal officer of a desalination technology company in the United States. This director reports he and Applicant are continuing to work with Mr. X "with growing effectiveness." While Mr. X has been the primary beneficiary of their informal reciprocal referrals, Applicant's consulting services were formally retained by an Israeli company in 1994 based on Mr. X's recommendation. With Applicant's assistance, this company established a subsidiary in the United States. Applicant's consulting services with foreign entities included a client search based on the promise of future payment for a Canadian group seeking entry into the medical technology field in the United States in the 1993/94 time frame.

Independent consultancy brings with it a varied clientele and the potential for conflicting interests. The Government has a legitimate interest in ensuring that Applicant's consulting activities for other parties do not pose a risk to his duties for the defense contractor.(10) Under Guideline L of the Directive, any service or employment, whether compensated or volunteer, with 1) a foreign country, 2) any foreign national, 3) a representative of a foreign interest, or 4) any foreign, domestic or international organization or person engaged in analysis, discussion, or publication of material on intelligence, defense, foreign affairs or protected technology; could create an increased risk of unauthorized disclosure of classified information.(11) Applicant's informal, business referrals to Mr. X, as well as his formal consulting activities on behalf of the Canadian group and the Israeli video conferencing company, fall within disqualifying conditions (DC) E2.A12.1.2.2. (service for a foreign national) and E2.A12.1.2.3. (service for a representative of a foreign interest). Although Applicant has linked this foreign national with United States domestic companies involved in the development or manufacture of products/technologies with commercial applications such as the desalination process, Applicant has assisted Mr. X in procuring for this Israeli businessman wall penetrating radar technology and small tracking beepers. While these products were apparently intended for law enforcement purposes, such devices could have defense uses. Applicant also acknowledged he had a relatively recent discussion with Mr. X about missile technology. DC E2.A12.1.2.4.(service for a foreign person engaged in the discussion of material on defense or protected technology) likewise must be considered.

Under the Directive, the security concerns presented by outside activities involving foreign entities may be mitigated where the employment and/or activity has been discontinued (*See* E2.A12.1.3.2.), or where it can be determined that the outside employment or activity does not pose a conflict with his security responsibilities (*See* E2.A12.1.3.1.). There is no evidence Applicant has been on a retainer or otherwise had any contact with the principals of the Israeli video conferencing company since April 1995. While he has tracked the performance of the company's United States subsidiary which the foreign firm established with his help, there is no evidence he has any financial stake in either the Israeli company or its subsidiary. Similarly, Applicant has not acted on the behalf of the Canadian group since 1995. Applicant does not intend to renew any connection with this company as he considers the principals to be unethical, evidenced in part by their failure to compensate him for travel expenses incurred on their behalf. Since these formal business consulting arrangements have been discontinued, they no longer pose a security concern. Favorable findings are warranted with respect to subparagraphs 2.b. and 2.c. of the SOR.

Applicant having taken no active steps to terminate the informal business referral arrangement with Mr. X, he has the burden of demonstrating his services for this Israeli businessman (and by extension, the Israeli company of which Mr. X is the principal owner) do not pose a conflict with his security responsibilities for the United States defense contractor. As of February 2002, according to the director of the desalination technology company, Applicant and he were working with growing effectiveness with their mutual acquaintance Mr. X. Since Applicant is being compensated by the United States company rather than r. X, he does not have a direct financial stake in whether Mr. X is ultimately successful in implementing the technology in Israel. While the potential for influence is minimized, it cannot be completely ruled out since Applicant remains on a retainer by the United States company. The mutually advantageous relationship which Applicant and Mr. X continue to share is perhaps best illustrated by Applicant securing tracking/beacon technology for Mr. X. At the request of Mr. X, Applicant linked him up with the United States manufacturer of small button memory. In return for his services, Applicant is to receive from r. X a percentage of any product sales in Israel. When asked at the hearing about his recent contacts with Mr. X, Applicant testified to having corresponded by electronic mail, mostly about the United States manufacturer of the detection device. The concern is not with Israel acquiring the technology, which is in the public domain, but with Applicant placing himself in a position where he could financially benefit from Mr. X's activities in Israel.

Applicant characterized Mr. X as an "international businessman," and proffered in validation an article from the corporate website of a United States aerospace corporation publicizing the award of a contract worth up to $206 million from Israel to supply and support three business jet aircraft for use as special electronic mission aircraft. Applicant related to his knowledge that Mr. X held a prominent part in the United States company's negotiations with the Israeli government and currently serves as the agent of record in Israel for the United States aerospace firm.(12) Mr. X's recent activities continue to bring him in contact with the Israeli government. Applicant has exhibited his willingness to respond to Mr. X's inquiries, which even included a discussion about missile launch detection technology. Although Applicant was careful to discuss only what was in the public arena, the potential for pressure and exploitation or

inadvertent disclosure of classified information cannot be discounted because of his ongoing relationship with Mr. X, which is not subject to any independent control or oversight.

Since Applicant's consulting activities on behalf of Mr. X increase his vulnerability to coercion, exploitation, or pressure by a foreign government, disqualifying condition E2.A2.1.2.6. under Guideline B, foreign influence, applies as well. In order to mitigate the security concerns presented by his association with Mr. X, Applicant must show that this Israeli national is not an agent of a foreign power or in a position to be exploited by a foreign power in a way which could force Applicant to choose between loyalty to Mr. X and the United States (*See* E2.A2.1.3.1.); his contacts with Mr. X have been the result of official United States Government business (*See* E2.A3.1.3.2.); his contact and correspondence with foreign citizens are casual and infrequent (*See* E2.A2.1.3.3.); or he has promptly reported to proper authorities all contacts, requests, or threats from persons or organizations from a foreign country, as required (*See* E2.A2.1.3.4). Accepting Applicant's characterization of Mr. X as a business acquaintance with whom he shares holiday greetings but for whom he has no close feelings of affection, there is little risk Applicant could be exploited if pressure were to be placed on Mr. X by foreign authorities. Yet, also covered in Guideline B is the risk presented by foreign agents, who may attempt to gain influence by means which are not overtly coercive. Applicant testified he acts on the assumption everybody in Israel is involved with the military or law enforcement. Unable to conclude with a reasonable degree of certainty that r. X is not an agent of a foreign government, subparagraph 1.a. must be resolved against Applicant. Mr. X is well known in Israel for his heroics as a fighter pilot in the 1967 war and he is actively engaged in matters of benefit to Israel's defense.

FORMAL FINDINGS

Formal Findings as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline B: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Paragraph 2. Guideline L: AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: For the Applicant

Subparagraph 2.c.: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Elizabeth M. Matchinski

Administrative Judge

1. See Transcript p. 14. Under the Directive, either the applicant or Department Counsel may request a hearing. (See E3.1.3., E3.1.7., E3.1.8.).

2. Government Exhibit 3 and Applicant Exhibit D are the same document.

3. As of the hearing, Applicant was 71 years of age.

4. Applicant testified that Mr. X is well-known in Israel for his conduct as a fighter pilot during that nation's six day war in 1967. (Transcript pp. 51-53).

5. According to Applicant, Mr. X continued to fly for the airline after he became principal owner/operator of the small

Israeli company until his retirement in 1996/97. (Transcript p. 53).

6. Applicant testified that his arrangement with Mr. X was that if he [Mr. X] sold anything in Israel for the U.S. company, he would get a small percentage. (Transcript p. 57). It is not clear whether Applicant has received any funds from Mr. X.

7. See Transcript p. 86.

8. Applicant considers the President of the company to be a close personal friend. (See Transcript p. 85).

9. The extent to which this person has observed Applicant's handling of classified information is not clear.

10. Applicant's work for other clients, such as the desalination company for which he provides market assessment, is considered outside employment.

11. Nothing in the language of Guideline L requires that the foreign national or entity intends detrimental or inimical impact on the interests of the United States.

12. There is nothing in the website article which identifies Mr. X as the agent of record in Israel for the company. Mr. X may well have informed Applicant of his role in the negotiations when Applicant called him after he received the SOR.