DATE: July 25, 2003

In Re:

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

Applicant for Security Clearance

ISCR Case No. 01-22696

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is the Chief Operating Officer of a defense contractor. He was born in Israel, served in the Israeli Army and rose to a significant position 20 years ago, before emigrating to the U.S., where he became a citizen in 1993. He retains his Israeli citizenship and passport, which he uses for frequent business and personal trips to Israel. He has close family ties there and he represents his company in doing significant business with the Israeli military. Applicant views himself as a citizen of both countries, but he has not shown an unequivocal preference for the U.S. Mitigation has not been shown. Clearance is denied.

STATEMENT OF THE CASE

On August 28, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

On November 5, 2002, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made based on the written record, without a hearing before a DOHA Administrative Judge. The File of Relevant Material (FORM) was issued on January 23, 2003, and Applicant was informed that any response had to be submitted within 30 days of receipt of the FORM. The reply due date was extended to April 13, 2003, because a mixup at Applicant's company delayed his receipt of the FORM. In any case, no reply was submitted. The matter was assigned to me for decision on April 18, 2003.

FINDINGS OF FACT

Applicant is a 44-year-old Chief Operating Officer for a defense contractor. The SOR contains six allegations under

Guideline B (Foreign Influence) 1.a. - 1.f., and four allegations under Guideline C (Foreign Preference), 2.a. - 2.d. Applicant admits all 10 of the SOR allegations. The admissions are adopted as findings of fact.

The language contained in the NOTES section of Applicant's response to the SOR (Item 3) explains why Applicant believes the allegations he has admitted do not disqualify him from holding a security clearance. After considering the totality of the evidence derived from the contents of the FORM, I make the following additional FINDINGS OF FACT as to each SOR allegation:

Guideline C (Foreign preference)

1.a. - Applicant possesses and exercises dual citizenship with Israel and the United States.

1.b. - As of his September 11, 2001 interview with an agent of the Defense Security Service (DSS), Applicant possessed a valid Israeli passport. As of the closing of the record in this case, I find that Applicant still possesses a valid Israeli passport, since he has not shown otherwise, and he plans to renew it in the future (Item 3).

1.c. - Applicant used his Israeli passport instead of his U.S. passport to enter and leave Israel and during travel to Turkey in July 2001. He believes it is against Israeli law for an Israeli citizen to enter and exit Israel using any other passport, and that he would be a violation if he used his U.S. passport. Upon seeking to enter Turkey, he offered his U.S. passport, and was told he needed a visa, which he did not have. He was then told he did not need a visa if he used his Israeli passport, so he used the Israeli passport to gain entry. He has used his U.S. passport for all other purposes.

1.d. - Applicant applied for, and was issued, an Israeli passport on December 22, 1997, some five years after he had become a naturalized U.S. citizen on October 22, 1993, and after he had received a valid U.S. passport on November 2, 1993. His company does extensive business overseas, including about $2 million a year with Israel, so he uses the Israeli passport to be able to enter that country. Applicant's company has worked on U.S. military contracts since about 1992.

1.e. - Applicant travels to Israel from one to three times each year.

1.f. - Applicant served in the Israeli Army from December 1976 to June 1981. He rose in rank to become a deputy commander of an Israeli Air Force Base.

Guideline B (Foreign Influence)

2.a. - Applicant's mother is a resident and citizen of Israel. Applicant speaks with her by telephone weekly.

2.b. - Applicant's sister is a resident and citizen of Israel.

2.c. - Applicant's mother-in-law and father-un-law are citizens of Israel and currently reside in Israel.

2.d. - Applicant's wife and children are dual citizens of Israel and the U.S.

Israeli law does permit the voluntary renunciation of Israeli citizenship.

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above 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.

Considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to this case:

GUIDELINE C (Foreign Preference)

The Concern: 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.

Conditions that could raise security concerns and may be disqualifying:

1. the exercise of dual citizenship;

2. possession and/or use of a foreign passport;

3. military service . . . in a foreign country;

6. using foreign citizenship to protect financial or business interests in another country.

Conditions that could mitigate security concerns include:

1. dual citizenship is based solely on parents' citizenship or birth in a foreign country;

2. indicators of a possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship.

GUIDELINE B (Foreign Influence)

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 vulnerable to coercion, exploitation, or pressure.

Condition that could raise security concerns and may be disqualifying:

1. an immediate family member, or a person to whom the individual; has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country.

Condition that could mitigate security concerns include:

1. a determination that the immediate family members(s), . . . cohabitant, or associates in a foreign country are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States.

A Memorandum, dated August 16, 2000, from Arthur L. Money, Assistant Secretary of Defense (*Money Memorandum*) (Item 9) states: "consistent application of . . . Guideline [C] requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government."

Eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the Directive's "whole person" concept, I am not permitted to speculate, but can only draw those inferences and conclusions that 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.

If the Government meets its initial burden of proof and establishes conduct that creates security concerns 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 conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended, at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

CONCLUSIONS

Applicant became an Israeli citizen by birth to Israeli parents in 1958. He served in the Israeli Defense Forces (IDF) from 1976 to1981, but was not involved with any intelligence matters. He graduated as an engineer from an Israeli university in 1988 and worked for an Israeli firm from 1983 to 1988, managing "U.S. projects for an Israeli firm" (Item 4). He moved to the U.S. in 1988, founded his own company, and became a naturalized U.S. citizen in October 1993 (*Id.*). From 1988 to the present, he has traveled extensively overseas, to Israel and numerous other countries, to sell electronic test equipment for his employers. Israel is his second largest client, after the U.S. military.

In the course of his business dealings, he has met with officers of the Israeli Air Force and has returned to Israel about twice a year since 1994, to sell additional test equipment to the Israeli military. He is Chief Operating Officer of a firm that does business "in excess of $2M [understood to mean $2 million] every year in Israel," second only to business with the U.S. military. He conducts the same type of business in a number of NATO and South American countries. He has not had any social dealings with the military officials with whom he has dealt. Applicant's service in the Israeli Army from 1976 to 1981, during which time he rose to the position of a Deputy Commander of an Israeli Army base, is now more than 20 years in the past, and occurred before he became a U.S. citizen. As such, it does not suggest a preference for Israel over the U.S., since he had no obligation to the U.S. at the time. Nonetheless, I find it to be relevant in considering the impact of Applicant's current business dealings with the same military service.

Applicant renewed his Israeli passport in December 1997. He states that "[s]ince the U.S. permits dual citizenship with Israel, I see no reason to give up my Israeli citizenship, especially due to the fact that Israeli born people need an Israeli passport when entering and leaving Israel" (Item 3, Response to SOR). Applicant's Israeli passport is/was valid until December 21, 2002. The last word/evidence on this issue appears in Applicant's November 2, 2002 (Item 3), at which time the Israeli passport was still valid. In the absence of other information, I conclude that SOR 1.b. is still accurate.

I have carefully considered Applicant's rationale for the conduct alleged in the SOR. The fact of his contributions in developing critical test equipment for the U.S. Army and Air Force over the past 12 years is understood and appreciated. However, my decision must ultimately be based on whether Applicant's conduct comes within any of the disqualifying conditions under Guideline C and whether his relationships come within any of the disqualifying conditions under Guideline B. If so, I must then decide whether he has established adequate mitigation and/or extenuation under any or all of the parallel mitigating conditions. I conclude that he has not done so.

I have considered Applicant's explanations for his retention of his Israeli passport (Item 3). In paragraphs 2 and 3 of his answers to the SOR, his statements suggest that he had no choice but to use the Israeli passport, since he was an Israeli citizen, as well as a U.S. citizen. This suggests that he had no choice about being an Israeli citizen, but this premise is incorrect. Israeli law does provide

for the voluntary renunciation of Israeli citizenship. (www.dss.mil/training/adr/forpref/dualT.htm - Citizenship Laws of 206 Countries).

While the legality of dual citizenship is recognized by the U.S. Supreme Court, dual citizenship is still a valid concern in determining wether an individual is eligible to hold a security clearance. Access to the nation's secrets has long been recognized as a privilege and not a right. (*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 occupy a position . . . that will give that person access to such information" (*Id*., at 527). The President has restricted eligibility for access to classified information to U.S. citizens whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion and sound judgment, *as well as freedom from conflicting allegiances and potential for coercion, and willingness to abide by regulations governing the use, handling, and protection of classified information."* (Executive Order 12968 § 3.1(b) (August 4, 1995) (Emphasis added). Eligibility for a security clearance is predicated upon an applicant meeting the security guidelines contained in the Directive.

Under Guideline C, Foreign Preference, Applicant has not mitigated Disqualifying Condition (DC) 1, since he has not expressed a willingness to renounce his Israeli citizenship, under Mitigating Condition (MC) 4. He has not mitigated DC 2, since he retains his Israeli passport and intends to keep it, under both MC 4 [giving up his Israeli citizenship necessarily means the surrender or invalidation of his Israeli passport] AND the *Money Memorandum* (Item 9), which precludes the holding of a security clearance by an individual who retains a foreign passport, unless authorized by an appropriate U.S. Government agency). Applicant received the *Money Memorandum* as Item 9 within the FORM he has had since at least March 2003, but there is no evidence he has acted to surrender the passport to comply with the requirements of that memorandum. In such a case, no other mitigation is recognized.

Under Guideline B, Foreign Influence, Applicant has intimate ties with close family members (mother, with whom he has weekly telephone contact, sister, and in-law) who are citizens and residents of Israel and his spouse and children, all dual citizens residing with him. (DC 1 and DC 2). Under the facts of record, including but not limited to Applicant's doing substantial business with the Israeli government and military, I am unable to make the determination allowed under MC 1 that there is not an "unacceptable security risk." As to MC 3, Applicant's contacts with family in Israel are clearly not "casual or infrequent." I also conclude that Applicant's business dealing with the Israeli military constitute a Israel a "substantial financial interest" (DC 8) in that country that cannot be considered "minimal" under MC 5 and has not been mitigated by any record evidence.

Based on the overall record, I conclude that the record does support all of the SOR allegations, and establishes a nexus or connection with Applicant's eligibility to hold a security clearance. I also conclude that Applicant has not demonstrated adequate mitigation or extenuation.

While Applicant's conduct and relationships do not affect his eligibility to hold U.S. citizenship, those same factors are too extensive and material to ignore when considering him for access to the nation's secrets. The ultimate burden in establishing eligibility is always with the person seeking a clearance and, in this case, Applicant has not resolved all relevant issues in his favor. It is basic to the security clearance program that all doubts must be resolved against the granting of a clearance. "[S]ecurity clearance determinations should err, if they must, on the side of denials" (*Egan*, 484 U.S. at 531; *see*, Directive ¶ E2.2.2.).

In addition, Applicant's failure to surrender his Israeli passport constitutes a separate and mandatory basis for denying a security clearance. (*Money emorandum,* Item 9).

FORMAL FINDINGS

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

Guideline C (Foreign Preference)

SOR 1.a. Against the Applicant

SOR 1.b. Against the Applicant

SOR 1.c. Against the Applicant

SOR 1.d. Against the Applicant

SOR 1.e. Against the Applicant

SOR 1.f. Against the Applicant

Guideline B (Foreign Influence)

SOR 2.a. Against the Applicant

SOR 2.b. Against the Applicant

SOR 2.c. Against the Applicant

SOR 2.d. Against 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.

BARRY M. SAX

Administrative Judge