

DATE: October 18, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-27885

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Kathryn Antigone Trowbridge, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a member of the optical sciences research staff for a defense contractor. He is a dual citizen of Israel and the United States, holds passports from both countries, and has used his Israeli passport for travel to Israel. He worked as an intern for an international scientific institute in Israel for three months in 1997, and he maintains occasional contact with a former supervisor and a colleague. He has occasional contact with Israeli friends of his parents. He has strong interest in residing permanently in Israel at some time in the future. He has expressed willingness to serve in the Israeli Defense Forces as a condition of residing permanently in Israel. Foreign influence is not established, but foreign preference is established and not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On December 18, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to not grant a security clearance to Applicant. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleges securing concerns under Guidelines C (Foreign Preference) and B (Foreign Influence). Applicant answered the SOR in writing on January 15, 2004, and requested a hearing. The case was assigned to me on August 11, 2004, and I conducted a hearing on September 14, 2004. DOHA received the transcript (Tr.) on September 30, 2004.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR are incorporated into my findings of fact. I also make the following findings:

Applicant has an advanced degree in optical sciences and is a member of the research staff for a defense contractor. He has worked for his current employer since September 27, 1999. (Government Exhibit 1, pp. 1, 3-4) Much of Applicant's

work has military applications. Most of his employer's business involves national defense. (Tr. 57-58)

Applicant is a dual citizen of Israel and the United States, having been born in Israel of parents who are native-born citizens of the United States. His parents registered his birth with the United States Consulate in Jerusalem. (Applicant's Exhibit A) He and his parents visited Israel in 1977-78 and again in 1984. Appellant visited Israel alone in 1992, using his United States passport. (Tr. 60-61)

Applicant renewed his United States passport on January 27, 1997. He obtained an Israeli passport on April 4, 1997, and he used it for travel to Israel on April 16, 1997. (Tr. 41-42, Applicant's Exhibit C) He was employed as an intern by an international scientific institute in Israel from April to July 1997. While in Israel, he used his United States passport to visit Egypt and return to Israel. (Tr. 50-51; Applicant's Exhibit C)

Applicant's Israeli passport expired on April 4, 2000. In January 2004, Applicant asked the Israeli Consul General to issue a special permit that would permit travel to and from Israel without an Israeli passport. The Israeli Consul General has not yet responded to Applicant's request. (Tr. 42)

Applicant is registered for military service in Israel. He contacted the Israel Defense Forces in 1997 to update his service deferment status. He has not performed military service for Israel, but he testified at the hearing that he would be willing to serve if it were a prerequisite for permanently residing in Israel. (Tr. 53-54, 107)

Applicant contacts his previous supervisor at the international institute by telephone or e-mail approximately once a year. (Tr. 83) He has contact by telephone or e-mail about four times a year with an Israeli citizen and resident who was a colleague at the institute while Applicant was working as an intern. (Tr. 62) Applicant has occasional contacts by telephone or e-mail with a married couple who are citizens and residents of Israel. They and Applicant's parents became friends about 15 years ago while they were all living in the United States. (Tr. 63) Applicant has some great aunts, uncles, and cousins who are citizens and resident of Israel, but he has had no contact with them since 1997. (Tr. 64-65)

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 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 United States 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 and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through ¶¶ 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (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 applicant'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 ¶¶ E2.2.1.1 through E2.2.1.9.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that 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, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (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. ISCR Case No. 01-20700 at 3 (App. Bd. Dec 19, 2002); *see* Directive ¶ E3.1.15. 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* Directive ¶ E2.2.2.

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Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

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CONCLUSIONS

Guideline C (Foreign Preference)

Under Guideline C, "[w]hen 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." Applicable disqualifying conditions include the exercise of dual citizenship (DC 1), the possession and/or use of a foreign passport (DC 2), and military service or willingness to bear arms for a foreign country (DC 3). Directive, ¶¶ E2.A3.1.2.1 - E2.A3.1.2.3).

It is common knowledge that Israel is a democracy, a friend and ally of the United States, with strong political,

economic, and cultural ties to the United States. Nevertheless, the two countries do not always agree. Furthermore, "[t]he 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).

In his answer to the SOR, Applicant admits that he exercises dual citizenship. He is reluctant to relinquish his Israeli citizenship because it would be difficult for him to regain his Israeli citizenship "if and when [he decides] to relocate to Israel." I conclude that DC 1 is established.

Security concerns based on dual citizenship can be mitigated by showing that the dual citizenship is based solely on the parents' citizenship. Directive ¶ E2.A3.1.3.1. This mitigating condition is not established in this case, because Applicant has gone beyond possessing dual citizenship by operation of law. He has made a conscious decision to retain his dual citizenship and keep open the option of residing permanently in Israel.

Applicant's answer to the SOR states that he is willing to relinquish his Israeli passport if other provisions can be made that will permit him to visit Israel without an Israeli passport. Israeli citizens, including dual citizens, must enter Israel with an Israeli passport; otherwise, they will not be permitted to exit. (Applicant's Exhibit F, p. 2) Applicant has not received a response to his request for a waiver of this requirement. Applicant testified at the hearing that he will renew his Israeli passport if it is the only way he can travel back to Israel. (Tr. 68) Applicant's possession and use of his Israeli passport establish DC 2.

When DC 2 applies, the clarifying guidance issued by the Assistant Secretary of Defense, Arthur L. Money, dated August 16, 2000 (Money Memorandum), requires that a 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." The Money Memorandum also makes it clear that Guideline C recognizes "no mitigating factor related to the applicant's personal convenience, safety, requirements of foreign law, or the identity of the foreign country." Surrender of a passport contemplates returning it to the issuing authority. Merely keeping a passport until it expires does not satisfy the guidance in the Money Memorandum. ISCR Case No. 01-224306 at 5 (App. Bd. Sep. 30, 2003). Applicant has submitted no evidence of compliance with the Money Memorandum.

The fact that Applicant updated his status with the Israeli Defense Forces in 1997 does not *per se* establish DC 3. As Applicant explained in his answer to the SOR, he was required by Israeli law to update his status as a son of an immigrant to avoid being drafted at age 18 and to allow him to visit Israel without compromising his deferment from military service. Although Applicant has not served in the Israeli Defense Forces, he appears willing to serve as a prerequisite for permanent residence in Israel. I conclude that DC 3 is established by his willingness to serve in the Israeli Defense Forces as a consequence of being allowed to live there permanently.

The record establishes that Applicant has a strong attraction to Israel, that living in the United States is a temporary condition, and that, at some future date consistent with his family needs, he is likely to move to Israel permanently. In his answer to the SOR, Applicant stated that he was "open to the possibility" of moving to Israel in approximately 10 years. At the hearing, Applicant testified that he intends to move to Israel eventually, but that he is now contemplating the move in "10, 20 years - 30 years down the road." (Tr. 68) After Applicant answered the SOR, he married and now has a son and a stepson. (Tr. 51) His changed family status has caused him to postpone his plan to reside permanently in Israel within 5-10 years. (Tr. 52) He explained that the plan is "on the back burner now as something down the road when the time seems right." (Tr. 92) He is attracted to the possibility of residing permanently in Israel because of his religion, beliefs, and heritage. (Tr. 88) I conclude that Applicant's foreign preference under Guideline C is established. No mitigating conditions have been established.

Guideline B (Foreign Influence)

A security risk may exist when an applicant's immediate family, or other persons to whom he may be bound by affection, influence, or obligation, are not citizens of the U.S. or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Directive ¶ E2.A2.1.1. A disqualifying condition (DC 1) may arise when "[a]n 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." Directive ¶

E2.A2.1.2.1.

Applicant has no immediate family members in Israel at present. He has no contact with his distant cousins, great aunts, and great uncles who reside in Israel. His parents have indicated interest in moving to Israel at some indefinite date in the future. Applicant's annual contact with a previous supervisor appears to be purely professional and not based on close ties of affection. Department Counsel did not produce any evidence that Applicant's quarterly contact with a former graduate student is based on close ties of affection. Similarly, Applicant's contacts with family friends of long standing appear to be based on parents' friendships, and there is no evidence of close ties of affection between Applicant and this family. Unlike close family members, there is no presumption that Applicant has close ties of affection for friends and professional associates. *Compare* ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at *8 (App. Bd. Feb. 20, 2002) (rebuttable presumption of close ties of affection or obligation to immediate family members of spouse). Thus, I conclude that the DC 1 is not established regarding any of these relationships.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline C: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: Against Applicant

Subparagraph 1.i.: Against Applicant

Subparagraph 1.j.: Against Applicant

Paragraph 2. Guideline B: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For Applicant

Subparagraph 2.d.: For Applicant

DECISION

In light of all of 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. Clearance is denied.

LeRoy F. Foreman

Administrative Judge