

KEYWORD: Foreign Preference; Foreign Influence

DIGEST: Applicant is a 60-year-old professor of aeronautical engineering who seeks a security clearance. Applicant has an expired Israeli passport, and holds dual U.S. and Israeli citizenship. Applicant has not surrendered his Israeli passport. Applicant has family members who are citizens of and resident in Israel, including his daughter who is a member of the Israeli military. Applicant did not mitigate the foreign preference or the foreign influence security concerns. Clearance is denied.

CASENO: 02-17178.h1

DATE: 09/30/2004

DATE: September 30, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-17178

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esq., Department Counsel

FOR APPLICANT

Bob Herman, Esq.

SYNOPSIS

Applicant is a 60-year-old professor of aeronautical engineering who seeks a security clearance. Applicant has an expired Israeli passport, and holds dual U.S. and Israeli citizenship. Applicant has not surrendered his Israeli passport. Applicant has family members who are citizens of and resident in Israel, including his daughter who is a member of the Israeli military. Applicant did not mitigate the foreign preference or the foreign influence security concerns. Clearance is denied.

STATEMENT OF THE CASE

On October 21, 2003, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under the personnel security Guideline C (Foreign Preference) and Guideline B (Foreign Influence) 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 Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

In a signed and sworn statement, dated November 14, 2003, Applicant responded to the SOR allegations. He requested a hearing. This case was assigned to me March 5, 2004.

A Notice of Hearing was issued on March 23, 2004, setting the hearing April 15, 2004. On that date, I convened the hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government presented 11 exhibits which were admitted into evidence. Applicant appeared and testified, and offered

nine exhibits, all of which were admitted into evidence. I received the transcript (Tr.) of the hearing on April 27, 2004.

FINDINGS OF FACT

Applicant admitted the allegations in the SOR. Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is 60 years old, and was born in Israel. He is a professor in aeronautics at a major university, and seeks a security clearance to consult with a defense contractor. Applicant is married, with two adult children from each of his two marriages. Applicant moved to the U.S. in 1968. (Tr. 30,37, 46, 52, 58, 67; Exhibit 1)

Applicant served in the Israeli Army special forces from 1961 to 1964. He worked as a tourist guide in Israel from 1964 to 1968. In 1968 he came to the U.S. with his first wife who was going to study here. Applicant learned to fly in the U.S. and worked as a pilot from 1968 to 1971. From 1971 to 1974 he went to college in the U.S. and obtained his undergraduate degree in engineering. From 1974 to 1975 Applicant studied to obtain his master's degree in aeronautical engineering. He then returned to Israel and worked for a year in an Israeli defense industry business. Then Applicant joined the Israeli Air Force as a test pilot, flying their aircraft until 1977, when he resigned his commission and returned to the U.S. He worked as an instructor in a college from 1978 until 1981, then studied for his doctorate in aeronautical engineering from 1981 to 1983. In 1983 he obtained the professorship he continues to hold and has taught at his present university since 1983. Applicant became a naturalized U.S. citizen in February 1993. Applicant worked for a defense contractor for several years, had a security clearance and access to classified information, and complied fully with all security requirements. (Tr. 9 to 12, 37 to 39, 47, 48, 52 to 55, 69 to 74; Exhibits 1, 2, and 3)

Applicant's daughter from his first marriage has dual U.S. and Israeli citizenship, as does Applicant's present wife and their daughter. That daughter is presently in Israel and is a member of the Israeli Defense Forces (IDF). Of Applicant's two sons, the older died at age 19, and the son from Applicant's present marriage is studying for an advanced degree in the U.S. (Tr. 40, 52, 53, 73, 74; Exhibits 2 and 3)

Applicant has family members living in Israel: His mother, whom he has not seen nor had contact with since he was 13 years old and left home; his sister, whom he does not like, and has not had contact with since Applicant was 13 years old; another sister, who works for the Israeli postal system and whom Applicant visits every couple of years; and his brother, whom he contacts by email periodically and saw last summer in Israel. Applicant is not certain his mother or sister are still alive. His brother manages the computer system for an HMO company. (Tr. 40 to 44)

Applicant obtained a U.S. passport when he became a naturalized U.S. citizen. It expired in 2002 and he renewed it until 2012. Applicant uses that passport when he travels outside the U.S. Applicant also obtained had an Israeli passport at the same time, which expired in 1997. Applicant renewed that passport in 1997, and it expired in 2002. Applicant is a dual Israeli and U.S. citizen. Applicant has dual citizenship because it is allowed, he says. Applicant has not surrendered the expired Israeli passport, but stated he would do it if necessary to obtain a security clearance. He also said he would renounce his Israeli citizenship if that were necessary for a security clearance. Applicant "guessed" he would bear arms against Israel if the U.S. and Israel were ever opposed to each other in a conflict. Applicant renewed his Israeli passport because someone told him he needed it as an Israeli citizen to depart Israel when he visited it. He later found out that advice is erroneous, in his belief. He agreed not to renew his expired Israeli passport. His expired Israeli passport does not contain any customs stamps showing it was used from 1997 to 2002. Applicant's U.S. passport shows several stamps evidencing Applicant's overseas travels in that same time period. Applicant adamantly stated he could be bribed, coerced, or intimidated. (Tr. 31, 32, 36, 45, 50, 56, 57, 60, 63, 64; Exhibits 2, 3, and 4, G, H, and I)

Applicant is a well-educated, intelligent, and respected aeronautical engineering professor and consultant. Several colleagues submitted statements on his behalf expressing their opinions about his character and loyalty to the U.S. (Tr. 8 to 12; Exhibits A to F)

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* Section 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicted upon the applicant meeting the security guidelines contained in the Directive.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, 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 that must be carefully considered according to the pertinent Guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 (See Directive, Section E2.2.1., Enclosure 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 condition 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 other behavior specified in the Guidelines.

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 condition 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 other behavior specified in the guidelines.

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. All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a prima facie case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. See Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. See Exec . Or. 12968 § 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of 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. Directive ¶ E2.A3 .1.1.

Conditions that could raise a security concern and may be disqualifying include:

The exercise of dual citizenship. Directive ¶ E2.A3.1.2.1.

Possession and/or use of a foreign passport. Directive ¶ E2.A3.1.2.2.

Military service ... for a foreign country. Directive ¶ E2.A3.1.2.3.

E2.A3.1.3. Conditions that could mitigate security concerns include:

Dual citizenship is based solely on parents' citizenship or birth in a foreign country. Directive ¶ E2.A3.1.3.1.

Indicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship. ¶ E2.A3.1.3.2.

Individual has expressed a willingness to renounce dual citizenship.

Directive ¶ E2.A3.1.3.4.

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 potentially vulnerable to coercion, exploitation, or pressure.

Directive, ¶ E2.A2.1.1.

Conditions that could raise a security concern and may be disqualifying include:

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. Directive, ¶ E2.A2.1.2.1.

Relatives who are connected with any foreign government. E2.A2.1.2.3.

Conditions that could mitigate security concerns include:

A determination that the immediate family member(s) (e.g., spouse, mother, daughter, brother, or sisters) 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. Directive, ¶ E2.A2.1.3.1.

Applicable also is the Memorandum of August 16, 2000, entitled "Guidance of DoD Central Adjudication Facilities (CAF) Clarifying the Application of Foreign Preference Adjudicative Guidelines", by the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASDC3I), commonly known as the "Money Memo". This memorandum guidance states that

possession and/or use of a foreign passport may be a disqualifying condition. . . The only applicable mitigating factor addresses the official approval of the United States Government for the possession or use. The security concerns underlying this guideline are that the possession and use of a foreign passport in preference to a U.S. passport raised doubt as to whether the person's allegiance to the United States is paramount and it could also facilitate foreign travel unverifiable by the United States. Therefore, consistent application of the guideline requires that any clearance be denied or revoked until the applicant surrenders the

foreign passport or obtains official approval for its use from the appropriate agency of the

United States Government.

The United States citizenship oath, found at 8 U.S.C. §1448, states in part, "I hereby declare, on oath, That I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen; That I will support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; That I will bear true faith and allegiance to the same; . . ."

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions above, I conclude the following with respect to each allegation set forth in the SOR:

Guideline C - Foreign Preference: The Government met its burden and established the facts by substantial evidence. Individuals who act in ways that indicated preference for a foreign country over the United States may be prone to provide information or make decisions that are harmful to the interests of the United States. (Directive ¶ E2.A3.1.1.) The Government showed Applicant is a dual citizen of the U.S. and Israel. The Government also showed Applicant has an expired Israeli passport that he has not surrendered to the issuing authority, the Israeli government. Applicant renewed his Israeli passport while a U.S. citizen and after obtaining a U.S. passport. Applicant also served twice in the IDF, first in the army and then in the air force as a test pilot. Disqualifying Conditions (DC) 1, 2, and 3 apply.

Applicant must now meet his burden to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). 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. Here, Applicant has failed to meet his burden. He has not overcome the requirements of the ASDC3I memorandum which reiterates that the failure to surrender the foreign passport is a disqualifying condition. Applicant had an Israeli passport until 2002. Applicant cited several cases at the hearing to support his contention that an expired passport is the same as a surrendered passport, such as *Money Memo*. I examined those cases⁽¹⁾, but am not persuaded. I am not required to subscribe to that theory as some of my colleagues did under the facts of the cases before them. The DOHA Appeal Board has held that expiration of a passport is not the same as surrender under the *Money Memo*, and I am bound by those decisions⁽²⁾. Furthermore, there is a definite difference in law and fact between "expiration" of something, and the "surrender" of it.

Mitigating Condition (MC) 1 (Dual citizenship is based solely on the parent's citizenship or birth in a foreign country) does apply here. Applicant is an adult and retains his Israeli citizenship because the law allows him to do so. He took the U.S. citizenship oath voluntarily in 1993, but kept his Israeli passport and renewed it in 1997 for his own convenience of getting out of Israel after his periodic visits there. In addition, the willingness to renounce dual citizenship is C 4, but does not apply here. Applicant has not taken any action to renounce his dual citizenship, and his statements at the hearing on this issue impressed me as reluctant and less than a "willingness" contemplated by MC 4. A promise of future action is not persuasive on this issue. The willingness to renounce is hollow absent the actions of renunciation.

MC 2 applies to Applicant's prior military service in the Israeli military. That activity ceased by 1978, before Applicant became a U.S. citizen in 1993. However, they do not outweigh the disqualifying weight of the ASDC3I memorandum requirements, coupled with Applicant's renewal of a foreign passport after becoming a United States citizen. Therefore, I find against Applicant on this guideline.

Guideline B - Foreign Influence: Disqualifying Conditions (DC) 1 (An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen or, or resident or present in, a foreign country) and DC 3 (relatives connected with any foreign government) apply here. The Government presented sufficient evidence to establish its allegations. Applicant's mother, two sisters, and brother live and work in Israel. Applicant's daughter moved to Israel and joined the IDF. As a member of the Israeli military forces, Applicant's daughter is connected with a foreign government within the meaning of DC 3. Applicant's spouse is a dual U.S. and Israeli citizen.

Mitigating Condition (MC) 1 (the immediate family members are not agents of a foreign power or in a position to be exploited) is applicable here to Applicant's mother and sister, with whom Applicant has not had contact for 47 years. Applicant's brother and other sister are not agents of a foreign government, though it is unclear from the record if the Israeli postal system, his sister's employer, is a government entity. These relationships are not casual and infrequent because they are regular and between family members, so MC 3 is not applicable. Applicant's daughter, as a member of the Israeli military, is an agent of a foreign government, and MC 1 does not apply. She could also be exploited in a way that could force Applicant to choose between his loyalty to the U.S. and to his daughter. His relationship with his daughter living in Israel, who is a dual citizen, is not casual and infrequent by its very nature, so MC 3 does not apply here. MC 1 applies to Applicant's dual citizen spouse. Considering the totality of facts, I find against Applicant on this Guideline.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline C: Against Applicant

Subparagraph 1.a.: Against Applicant

Paragraph 2 Guideline B: Against Applicant

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

DECISION

In light of all the circumstances and facts 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.

Philip S. Howe

Administrative Judge

1. ISCR No. 02-14006; ISCR No. 02-27337; ISCR No. 02-27647; ISCR No. 02-12617; and ISCR No. 02-09131.
2. ISCR No. 01-00783, DOHA Appeal Board (Dec. 2001); No. 01-24306, DOHA Appeal Board (Sept. 2003); ISCR No. 01-22606, DOHA Appeal Board (June 2003); see also ISCR No. 03-12349.