KEYWORD: Foreign Influence; Foreign Preference; Personal Conduct

DIGEST: Applicant is unable to successfully mitigate the security concerns of foreign preference and foreign influence based on his significant connections to Israel. Clearance is denied.

CASENO: 03-04090.h1

DATE: 07/29/2004

DATE: July 29, 2004

In re:

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

Applicant for Security Clearance

ISCR Case No. 03-04090

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

FOR APPLICANT

Evan R. Berlack, Esq., Lila Pankey Ray, Esq.

SYNOPSIS

Applicant is unable to successfully mitigate the security concerns of foreign preference and foreign influence based on his significant connections to Israel. Clearance is denied.

STATEMENT OF THE CASE

On November 20, 2003, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant.[(1)] The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline B for foreign influence, Guideline C for foreign preference, and Guideline E for personal conduct. At the start of the hearing, Department Counsel conceded he did not have sufficient evidence to establish the falsification allegation under Guideline E, and so that matter will not be discussed further.[(2)]

Under Guideline B, the SOR alleged that Applicant's spouse, four minor children, father, and three brothers are citizens of and residents in Israel, that Applicant owns property in Israel, and that one brother is employed by the Israeli government. Under Guideline C, the SOR alleged, among other things, that Applicant moved from the U.S. to Israel in 1983, became an Israeli citizen in 1987, possesses an Israeli passport, and served in the Israeli military.

Applicant answered the SOR on December 24, 2003, and he requested a clearance decision based on a hearing record. He admitted the SOR allegations under Guidelines B and C except he denied having a current military service obligation.

The case was assigned to me on March 22, 2004. On March 31, 2002, a notice of hearing was issued to the parties scheduling the hearing for May 10, 2004. Applicant appeared with counsel and the hearing took place as scheduled. DOHA received the transcript May 20, 2004.

FINDINGS OF FACT

Applicant's admissions are incorporated as facts. After a thorough review of the record evidence, I make the following essential findings of fact:

Applicant is a 53-year-old married man and a native-born U.S. citizen. He is employed as the general manager and chief of technology for a technology company located in Israel. He has worked for this company since January 1985, and he has been the general manager since 1990. In this capacity, he oversees the work of about 110 employees. The Israeli company is a subsidiary of a technology company located in New York state. In turn, the New York company is owned by a parent company, which is a publicly traded U.S. company located in another U.S. state.

Applicant's father is a retired U.S. federal employee who, along with his wife, decided to immigrate to Israel upon his retirement. Applicant's father worked for 25 years with a U.S. governmental research laboratory and held a top-secret security clearance for that employment. Applicant's two younger brothers went along with their parents to Israel while Applicant and another brother remained in U.S. to pursue their formal education. From August 1970 to May 1983, Applicant traveled to Israel annually as a tourist.

Applicant worked for the New York company as a junior engineer during 1979 - 1983. During 1983, Applicant decided to immigrate to Israel. He did so because he concluded Israel was the place for him to seek his personal fulfillment "as a religious Jew."[(3)] He also believes Israel is the best place for the education of his children. Likewise, he has stayed in Israel for the same reasons that led him to move there.

In September 1983, Applicant found employment working with an Israeli communications company and worked there until January 1985 when he accepted employment as chief engineer with his current employer. He lived in Israel as a legal resident until 1987 when he obtained Israeli citizenship. As a requirement of that citizenship, Applicant served on active duty in the Israeli military from June 1988 to July 1988 when he was honorably discharged. Since then, he served in a reserve capacity involved with homeland defense, although in a noncombatant status, until sometime in 2001 when he was discharged or released from further service. Applicant no longer has any type of Israeli military obligation. Accordingly, I find for Applicant on SOR subparagraphs 1.f and 1.g concerning current military reserve duty.

In January 1992, Applicant applied for a U.S. security clearance (Exhibit 1). In doing so, he disclosed his Israeli connections and that his current residence was in Israel. Notwithstanding those matters, the Defense Department granted Applicant a secret-level security clearance, which he has held--without adverse incident--to date. Although Applicant has had access to U.S. classified information while attending business meetings in the U.S. with relevant officials to better understand contract requirements, U.S. classified information has never been present at the Israeli subsidiary.

Holding a security clearance is a responsibility Applicant takes quite seriously. He understands the security clearance is for the purposes of the U.S. only and that it is to be used only for the purpose for which it was granted.

Applicant now possesses both U.S. and Israeli passports. He uses the U.S. passport for his foreign travel outside of Israel. And he uses the U.S. passport when entering and departing the U.S. He uses the Israeli passport when entering and departing Israel. He does not appear to be willing to surrender his Israeli passport.[(4)] Likewise, he does not appear to be willing to renounce his Israeli citizenship.[(5)] Since living in Israel, Applicant has voted in Israeli elections. He has also voted in the U.S. presidential elections since moving to Israel.

Applicant owns the apartment or condominium where he and his family reside. He estimates the apartment's market value at U.S. $250,000.00. He estimates the apartment amounts to one-third of his net worth.[(6)] Applicant does not own real estate in the U.S. or any other country. Applicant estimates he has about $25,000.00 to $30,000.00 in financial accounts in the U.S. Applicant also has stock options with the U.S. parent company. His primary bank is in Israel and it is where his salary is deposited.

Applicant's physical presence is the U.S. is limited to four or five business trips per year. He is not a resident of any particular U.S. state, and so, he does not possess a driver's license issued by a U.S. state. Nor does he file any type of state tax return. But since moving to Israel in 1983, Applicant has filed an annual U.S. federal income tax return.

Applicant's is married to a native-born Israeli citizen. She works as a teacher in a local school. She has no status with U.S. immigration authorities. Applicant and his wife have four children, ages ten, eight, five, and three, all of whom are dual citizens of the U.S. and Israel, although the children are all native-born Israeli citizens. Applicant's father and three brothers are citizen residents of Israel as well as dual citizens of the U.S. and Israel. The father is retired living on his U.S. federal retirement, one brother is employed by the Israeli government, and the other brothers work in private industry.

Applicant is a highly skilled, talented, and trusted engineer. He is and has been a key and integral part of a program providing critical engineering knowledge for the development of certain defense-related products (Exhibits A, B and C). According to the vice president for business development of the parent company, the Israeli subsidiary is one of the leading suppliers of the defense-related products it manufactures. Applicant's role as general manager and chief of technology is key because the work involves engineering custom products, a task that both Applicant and the Israeli subsidiary excel in doing.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the record evidence as a whole, the following security guidelines are most pertinent here: Guideline B for foreign influence[(7)] and Guideline C for foreign influence.[(8)]

In August 2000, the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASDC3I), issued a memorandum clarifying the application of the foreign preference security guideline for cases involving possession and/or use of a foreign passport (Appellant Exhibit 1--the so-called oney Memorandum--because it is signed by Assistant Secretary Arthur L. Money). In pertinent part, the Money Memorandum "requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains approval for its use from the appropriate agency of the United States Government."

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.[(9)] There is no presumption in favor of granting or continuing access to classified information.[(10)] The government has the burden of proving controverted facts.[(11)] The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than a preponderance of the evidence.[(12)] The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.[(13)] "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."[(14)] Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.[(15)] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[(16)]

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[(17)] Under *Egan,* Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

1. Guideline C-Foreign Preference

Under Guideline C, a security concern may exist when a person acts in such a way as to indicate a preference for a foreign country over the U.S. In particular, the exercise of dual citizenship raises a security concern because the active exercise of foreign citizenship may indicate a preference for that foreign country over the U.S. Dual citizenship by itself, however, is not automatically a security concern. Absent the exercise of dual citizenship or indicia of some affirmative action demonstrating foreign preference, mere possession of foreign citizenship by virtue of birth does not fall within the scope of Guideline C.

Department Counsel requested that I find for Applicant on SOR subparagraph 1.c because it is not legally sufficient; namely, it merely states "You are a dual citizen of the United States and Israel." I agree, and Department Counsel was correct to do so because only the exercise of dual citizenship is a security concern under Guideline C. Possession or passive maintenance of dual citizenship, with nothing more, is not a security concern. This matter is controlled by well settled agency case law.[(18)] But any potential harm to Applicant is cured by Department Counsel's concession as well as the record evidence otherwise proving Applicant has exercised dual citizenship.

Here, based on the record evidence as a whole, the government has established by substantial evidence its case under Guideline C. By his actions--moving to Israel, obtaining Israeli citizenship, possessing and using an Israeli passport, serving in the Israeli military (active and reserve), and voting in Israeli elections--Applicant has demonstrated a clear preference for Israel. Under these circumstances, DC 1,[(19)] DC 2,[(20)] DC 3,[(21)] and DC 8[(22)] apply against Applicant. In addition to these matters, Applicant possesses an Israeli passport and he appears to be unwilling to relinquish or surrender it. Possessing any foreign passport invokes the *per se* rule created by the Money Memorandum, which requires a clearance be denied or revoked under these circumstances.

I have reviewed the mitigating conditions under Guideline C and conclude none apply. MC 1[(23)] does not apply because Applicant, a native-born U.S. citizen, moved to Israel and obtained his Israeli citizenship due to his choice to comply with Israeli law. MC 2[(24)] does not apply because the evidence shows just the opposite. MC 3[(25)] does not apply because there is no evidence to suggest the U.S. Government has approved of Applicant's activities. And MC 4 [(26)] does not apply because Applicant has not expressed a willingness to renounce his Israeli citizenship. Indeed, by all appearances, Applicant, as he is free to do, intends to live out his life with his family in Israel as an Israeli citizen.

Applicant has worked in the U.S. defense industry and held a security clearance for at least a decade, and he deserves

credit for his many contributions. Although not required to renounce dual citizenship to obtain access to classified information, the fact that Applicant is unwilling to renounce his Israeli citizenship is a clear, logical, and convincing reason to have concern given his affirmative exercise of dual citizenship. The same is true for Applicant's unwillingness to surrender his Israeli passport. In my view, Applicant intends to live, work, and raise his family in Israel because it suits him. This situation, although perfectly legal, ethical, and moral, creates a clear case of foreign preference, which is a bona fide security concern. And because Applicant possesses a foreign passport, the Money Memorandum requires an adverse decision. Accordingly, Guideline C is decided against Applicant.

2. Guideline B-Foreign Influence

Under Guideline B, a security concern 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 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. Contacts with citizens of other countries, or financial interests in other countries, are also relevant if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

Here, based on the record evidence as a whole, the government has established by substantial evidence its case under Guideline B. Applicant's wife, four minor children, father, and three brothers are citizen residents of Israel. One brother is employed by the Israeli government. The vast majority of Applicant's financial assets are in Israel. Under these circumstances, DC 1,[(27)] DC 3,[(28)] and DC 8[(29)] apply against Applicant. I have reviewed the mitigating conditions under Guideline B and conclude none apply. Accordingly, Guideline B is decided against Applicant.[(30)]

To conclude, this decision should not be construed in any way as an indictment of Applicant's loyalty and patriotism to the U.S., as those matters are not at issue. Nor is this decision based in any way on Applicant's exercise of his religion. Instead, the clearly-consistent standard requires I resolve any doubt against Applicant, and the record evidence here creates ample doubt. In reaching my decision, I have considered the evidence as a whole, the whole-person concept, and the appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

As required by ¶ E3.1.25 of Enclosure 3 to the Directive, below are my conclusions as to the allegations in the SOR:

SOR ¶ 1-Guideline C: Against the Applicant

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: For the Applicant

Subparagraph 1.d: Against the Applicant

Subparagraph 1.e: Against the Applicant

Subparagraph 1.f: For the Applicant

Subparagraph 1.g: For the Applicant

SOR ¶ 2-Guideline B: Against the Applicant

Subparagraphs 2.a - 2.f: Against the Applicant

SOR ¶ 3-Guideline E: For the Applicant

Subparagraph 3.a: 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. Clearance is denied.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. Transcript at pp. 13-14.

3. Transcript at p. 48.

4. Transcript at pp. 90-91.

5. Transcript at p. 92.

6. Transcript at p. 80.

7. Directive, Enclosure 2, Attachment 2, at pp. 21-22.

8. Directive, Enclosure 2, Attachment 3, at pp. 23-24.

9. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

10. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.

11. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

12. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

13. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

14. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

15. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

16. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

17. *Egan*, 484 U.S. at 528, 531.

18. ISCR Case No. 97-0356 (April 21, 1998) at p. 4 ("The Board notes the SOR alleges Applicant plans to maintain foreign citizenship. Absent evidence of the exercise of dual citizenship or indicia of some affirmative action demonstrating foreign preference, mere possession of foreign citizenship by virtue of birth does not fall within the scope of [Guideline] C.").

19. "The exercise of dual citizenship."

20. "Possession and/or use of a foreign passport."

21. "Military service or a willingness to bear arms for a foreign country."

22. "Voting in foreign elections."

23. "Dual citizenship is based solely on parents' citizenship or birth in a foreign country."

24. "Indicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship."

25. "Activity is sanctioned by the United States."

26. "Individual has expressed a willingness to renounce dual citizenship."

27. "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."

28. "Relatives, cohabitants, or associates who are connected with any foreign government."

29. "A substantial financial interest in a country, or in any foreign-owned or -operated business that could make the individual vulnerable to foreign influence."

30. In deciding this case, I have given no weight to Department Counsel's argument based on the case of *United States v. Pollard*, 959 F.2d 1011 (D.C. Cir. 1992).