

DATE: November 5, 2004

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-10390

## **ECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Francisco J. Mendez Jr., Esq., Department Counsel

#### **FOR APPLICANT**

Lawrence M. Monat, Esq.

### **SYNOPSIS**

Applicant became a naturalized U.S. citizen in 1971. He has foreign associates who are citizen residents of Israel. He obtained an Israeli passport in 1996 and failed to admit it on his security clearance application. Applicant failed to mitigate foreign preference, foreign influence, and personal conduct security concerns. Clearance is denied.

### **STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 9 March 2004, DOHA issued a Statement of Reasons<sup>(1)</sup> (SOR) detailing the basis for its decision-security concerns raised under Guideline C (Foreign Preference), Guideline B (Foreign Influence), and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on 15 April and 10 September 2004 and elected to have a hearing before an administrative judge. The case was assigned to me on 29 July 2004. On 22 September 2004, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 4 October 2004.

### **FINDINGS OF FACT**

Applicant is a 55-year-old naturalized U.S. citizen. He was a principal in a defense contractor, but because he lost his security clearance, he is now a junior vice-president.

Applicant was born in Israel and immigrated to the U.S. with his family when he was 16 years old. He became a U.S. citizen in 1971. In 1974, he married a woman who was born in Germany. She is also a dual national with Israel. She became a U.S. citizen in 1980. The couple has two adult children, both born in the U.S. Applicant's parents are both deceased. Applicant's father-in-law and brother-in-law are citizen residents of Israel. He also has a few cousins who are citizen residents of Israel. He contacts a few of these cousins a couple of times a year.

Applicant is an electrical engineer who has been employed by defense contractors for 30 years. He received his first Department of Defense security clearance in 1973. Applicant possesses a U.S. passport issued on 13 September 1995 that expires on 12 September 2005. He also has an Israeli passport that was issued on 10 July 1996. He used it on his most recent trip to Israel which was also in 1996. The passport expired in 1998, but in 1999 was extended until 14 September 2004.

Applicant executed his security clearance application (SCA) on 7 February 2003. Question 15 asked if, in the previous seven years, Applicant had an active passport that was issued by a foreign government. Applicant answered "no."

Applicant was interviewed by a Defense Security Service (DSS) agent on 25 March 2003. In arranging the interview, the DSS agent asked Applicant to bring his passports to the interview. Applicant admitted being a dual national and possessing both a U.S. and Israeli passport. He expressed a willingness to renounce his Israeli citizenship and relinquish his Israeli passport by the end of April 2003. Applicant still possessed the Israeli passport at the time of the hearing.

## 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.

Enclosure 2 of the Directive sets forth personnel 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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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.

## CONCLUSIONS

### **Guideline C--Foreign Preference**

In the SOR, DOHA alleged Applicant exercised dual citizenship with Israel (¶ 1.a), possessed an Israeli passport (¶ 1.b), and applied for an Israeli passport after being issued a U.S. passport (¶ 1.c). When an applicant acts in such a way as to indicate a preference for a foreign country over the U.S., then he may be prone to provide information or make decisions that are harmful to the interests of the U.S. Directive ¶ E2.A3.1.1.

The Government established by substantial evidence and Applicant's admissions each of the allegations in the SOR.

Although contained in three distinct subparagraphs of SOR ¶ 1, the disqualifying conduct amounts to only one allegation: Applicant exercised dual citizenship with Israel by obtaining and possessing an Israeli passport after becoming a naturalized U.S. citizen. It may be disqualifying for an Applicant to exercise dual citizenship. DC E2.A3.1.2.1. In this case, Applicant exercised that dual citizenship by obtaining and possessing an Israeli passport after he became a U.S. citizen. DC E2.A3.1.2.2. An applicant may mitigate the disqualifying conditions by demonstrating that his dual citizenship is based solely on his birth in the foreign country (MC E2.A3.1.3.1) and expressing a willingness to renounce his citizenship in the foreign country (MC E2.A3.1.3.4). Although Applicant's dual citizenship is based solely on his birth in Israel, by obtaining and using an Israeli passport after he became a U.S. citizen and possessed a U.S. passport, he demonstrated a foreign preference for Israel.

Applicant has expressed a willingness to renounce his Israeli citizenship and relinquish his Israeli passport. Applicant claims he has been unable to do so because the Israeli government is "clarifying his Israeli citizenship." Exs. C, D, E. Nevertheless, a clearance must "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." Memo. from Arthur L. oney, Asst Sec. Def. Command, Control, Communications, and Intelligence, to Directors of Defense Agencies, *Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline* (Aug. 16, 2000). Applicant has done neither. Under the circumstances, I am required to find against Applicant on ¶ 1.

### **Guideline B--Foreign Influence**

In the SOR, DOHA alleged Applicant's father-in-law, brother-in-law, and cousins are citizen residents of Israel (¶ 2.a); Applicant maintains quarterly contact with his relatives in Israel (¶ 2.b);, and he traveled to Israel in 1996 to visit relatives (¶ 2.c). 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 security concern exists if an applicant has immediate family members, or other persons to whom he is bound by affection or obligation, who are citizens, residents, or present in a foreign country. DC E2.A2.1.2.1. There is a rebuttable presumption that an applicant has ties of affection for, or obligation to, members of his wife's immediate family. ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at \* 8 (App. Bd. Feb. 20, 2002). Applicant failed to rebut the presumption with regard to his father-in-law and his brother-in-law. Evidence Applicant stays in touch with other relatives in Israel establishes that he is bound by affection or obligation to them.

An applicant may mitigate foreign influence security concerns by showing his foreign associates are not agents of a foreign government and are not in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the U.S. and loyalty to the associate. MC E2.A2.1.3.1. After reviewing all of the evidence, I am convinced Applicant's foreign associates are not agents of a foreign government. But they are in a position where they could be exploited. Applicant could also mitigate this security concern by showing his contact and correspondence with the foreign associates is "casual and infrequent." MC E2.A2.1.3.3. While his contacts are infrequent, they do not appear casual, at least with his father-in-law. Under all the circumstances, I find against Applicant.

### **Guideline E--Personal Conduct**

In the SOR, DOHA alleged Applicant falsified his SCA by deliberately failing to note he possessed an Israeli passport (¶ 3.a). Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

The deliberate omission, concealment, or falsification of relevant and material facts from an SCA raises a security concern regarding an applicant's trustworthiness, reliability, and candor. DC E2.A5.1.2.1. The Government established by substantial evidence that Applicant failed to disclose in his SCA that, within the previous seven years, he possessed an Israeli passport. The possession of a foreign passport is relevant and material to a determination of an applicant's security worthiness. Proof Applicant omitted this information from his SCA shifted the burden to Applicant to explain

the omissions sufficiently to negate a finding of knowing and deliberate falsification. *See* ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004).

None of the mitigating conditions apply. Applicant never provided convincing evidence as to why he did not list his possession of the Israeli passport on his SCA. He asserts he thought his passport had expired and he made prompt good-faith efforts to correct the falsification before being confronted with the facts. C E2.A5.1.3.3. But he obviously knew he was going to be questioned about his passports--the DSS agent instructed him to bring them to the interview. Applicant was just not credible. I find against him on ¶ 3.

### **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

Paragraph 2. Guideline B: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph 3.a: Against 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.

**James A. Young**

**Administrative Judge**

1. Pursuant to Exec. Or. 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).