DATE: September 30, 2005

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In Re:

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

Applicant for Security Clearance

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ISCR Case No. 03-26096

**DECISION OF ADMINISTRATIVE JUDGE**

**LEROY F. FOREMAN**

**APPEARANCES**

**FOR GOVERNMENT**

Julie R. Edmonds, Esq., Department Counsel

Eric Borgstrom, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant was born in Israel of Israeli parents. He became a naturalized U.S. citizen in October 1996 but used his Israeli passport to enter and exit Israel in January 2001. He executed a security clearance application (SF 86) in May 2003 and answered "no" to the question whether he held an active foreign passport during the last seven years. He surrendered his expired Israeli passport and renounced his Israeli citizenship in August 2005. The security concern based on foreign preference is mitigated, but the concern based on falsification of the SF 86 is not mitigated. Clearance is denied.

**STATEMENT OF THE CASE**

On January 25, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny Applicant a security clearance. 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 security concerns under Guidelines C (Foreign Preference) and E (Personal Conduct). Under Guideline C, the SOR alleges Applicant possessed an Israeli passport that was issued on July 2, 1995, extended on December 13, 2000, and expired on December 12, 2003 (¶ 1.a.); he extended his Israeli passport after he became a U.S. citizen (¶ 1.b.); and he used his Israeli passport to exit Israel in January 2001 after he became a U.S. citizen (¶ 1.c.). Under Guideline E, the SOR alleges Applicant falsified his SF 86 on June 4, 2003, by answering "no" to the question whether he had an active foreign passport in the last seven years.

Applicant answered the SOR in writing on March 3, 2005. He admitted the Guideline C allegations and offered explanations, denied deliberately falsifying his SF 86, and requested a hearing. The case was assigned to me on July 7, 2005. On July 22, 2005, DOHA issued a notice of hearing setting the case for August 23, 2005. The case was heard as scheduled. I kept the record open until September 23, 2005, to permit Applicant to submit additional documentary evidence. I received his additional evidence on August 29, 2005, and it is incorporated in the record as Applicant's

Exhibit B. DOHA received the transcript (Tr.) on September 6, 2005.

## FINDINGS OF FACT

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

Applicant is a 28-year-old employee of a defense contractor. He was born in Israel and naturalized as a U.S. citizen on October 25, 1996. He attended college in the U.S. and received a bachelor's degree in computer science in December 2000. He has never held a security clearance.

Applicant's parents were born in the Ukraine, emigrated to Israel and became Israeli citizens, and then emigrated to the U.S. Applicant's mother was naturalized as a U.S. citizen in January 1997, and his father was naturalized in February 2001.

Applicant was issued an Israeli passport in July 1995. In December 2000, he extended the expiration date of his Israeli passport in order to travel to Israel as part of a university student exchange program in January 2001. He used his Israeli passport to enter and exit Israel. His parents told him he was required to have an Israeli passport, annotated to show a waiver of the requirement for mandatory military service, to avoid being detained in Israel as a draft dodger. Applicant also believed he was required by Israeli law to use his passport to enter and exit the country.[(1)]

On May 22, 2003, Applicant executed a SF 86. He disclosed his dual citizenship and his travel to Israel in January 2001. However, he responded "no" to question 15, asking if he possessed an active foreign passport in the last seven years. When he was questioned about his dual citizenship by a security investigator four months later, he disclosed his possession and use of an Israeli passport.[(2)]

Applicant retained his dual citizenship because he feels affinity for Jewish culture and traditions, and he thought it was "cool" to hold dual citizenship. He saw no reason to renounce his Israeli citizenship until he learned it was an impediment to a security clearance.[(3)]

In his answer to the SOR, Applicant stated he misunderstood question 15, thinking it asked if a new foreign passport had been issued in the last seven years. He stated he did not think the question applied to an extension of a previously-issued passport. He initially gave the same explanation during his testimony at the hearing.[(4)] However, on cross-examination he testified the SF 86 was a long document, he was in a hurry to complete it, and he could not remember why he answered "no" to question 15.[(5)]

On August 22, 2005, Applicant mailed his expired Israeli passport to the Israeli Embassy, along with a cover letter expressing his desire to renounce his Israeli citizenship. The letter was received by a member of the embassy staff on August 23, 2005.

## 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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

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 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 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.

## CONCLUSIONS

### Guideline C (Foreign Preference)

When an applicant acts in such a way as to indicate a preference for a foreign country over the U.S., he or she may be prone to provide information or make decisions that are harmful to the interests of the U.S. Directive ¶ E2.A3.1.1. A disqualifying condition may arise if an individual exercises dual citizenship (DC 1), or possesses or uses a foreign passport (DC 2). Directive ¶¶ E2.A3.1.2.1., E2.A3.1.2.2. Applicant's use of his foreign passport was a exercise of dual citizenship. I conclude DC 1 and DC 2 are established.

Several mitigating conditions are relevant. MC 1 applies if dual citizenship is based solely on parents' citizenship or birth in a foreign country. Directive ¶ E2.A3.1.3.1. This mitigating condition is established because Applicant did not affirmatively seek foreign citizenship, but acquired it by virtue of his birth in Israel to parents who were citizens of Israel at the time.

MC 2 applies if indicators of possible foreign preference occurred before the individual obtained U.S. citizenship. Directive ¶ E2.A3.1.3.2. This condition is not established because Applicant's exercise of dual citizenship by using a foreign passport occurred after he acquired U.S. citizenship.

When possession or use of a foreign passport is involved, the clarifying guidance issued by the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (the "Money Memorandum"), dated August 16, 2000, requires denial of a clearance unless the applicant surrenders the foreign passport or obtains official approval for its use from the U.S. Government. Applicant has met this requirement by surrendering his expired Israeli passport.

MC 4 applies if the individual has expressed willingness to renounce dual citizenship. Directive ¶ E2.A3.1.3.4. This mitigating condition is established by Applicant's letter to the Embassy of Israel renouncing his Israeli citizenship.

Applicant made it clear during the hearing that he considers himself to be a U.S. citizen. He retained his dual citizenship because he felt some affinity for Jewish culture and traditions, it was "cool" to hold dual citizenship, and he saw no

reason to relinquish his Israeli citizenship until he learned it was an impediment to a security clearance. After weighing the disqualifying and mitigating conditions and evaluating the evidence under the "whole person" concept, I conclude Applicant has mitigated the security concern based on foreign preference.

**Guideline E (Personal Conduct)**

Under Guideline E, conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. Directive ¶ E2.A5.1.l. A disqualifying condition (DC 2) applies where there has been a deliberate omission or falsification of relevant and material facts from any personal security questionnaire. Directive ¶E2.A5.1.2.2.

Department Counsel argued that Applicant's failure to disclose his foreign passport "shifted the burden to the applicant to explain the omission sufficiently to negate a finding of knowing and deliberate falsification," citing ISCR Case No. 02-23133 (App. Bd. Jun. 9, 2004) at 5.[(6)] The Appeal Board has rejected this interpretation of its decision. ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not prove an applicant's intent when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent at the time the omission occurred. *Id.*

Applicant admits his negative answer to question 15 was incorrect, but he denies intentional falsification. His disclosures of his dual citizenship and travel to Israel in January 2001 support his denial of intent to falsify. On the other hand, he is a an intelligent and articulate college graduate who meticulously provided detailed information on the SF 86 about his family ties and connection with Israel. His intricate and somewhat convoluted initial explanation of how he misinterpreted question 15 as applying only to issuance of a new passport struck me as implausible and disingenuous. He abandoned that explanation at the hearing, falling back to an explanation that he hurriedly answered the question and did not remember why he answered it in the negative. His fallback explanation is inconsistent with the meticulous manner in which he executed the SF 86. I conclude DC 1 is established.

Two mitigating conditions (MC 2 and MC 3) are relevant to this case. MC 2 applies when the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily. Directive ¶E2A5.1.3.2. Applicant's falsification was isolated, but it also was recent, and Applicant did not provide the information until he was questioned by a security investigator. I conclude MC 2 is not established.

MC 3 applies when the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts. Applicant disclosed his foreign passport while being questioned about his dual citizenship, more than four months after he executed the SF 86. There is no evidence he was specifically confronted with his answer to question 15, but the evidence indicates the questioning focused on Applicant's ties to and preference for Israel. I conclude Applicant's disclosure was not "prompt," and it occurred only after he was questioned about his ties to Israel. The burden is on Applicant to rebut, extenuate, or mitigate disqualifying conditions. Directive ¶ E3.1.15. I conclude MC 3 is not established.

Under the general adjudicative guidelines, I have considered the seriousness of Applicant's conduct. Although his falsification was not alleged under Guideline J, it is relevant to consider that his conduct was a felony, in violation of 18 U.S.C. § 1001. Directive ¶ E2.2.1.1. It occurred only once, but it was recent. Directive ¶ E2.2.1.3. Applicant is relatively young, new to the workplace, and unfamiliar with security clearance procedures. Directive ¶ E2.2.1.4. Insufficient time has passed to determine whether Applicant is rehabilitated and whether a recurrence of his falsification is likely. Directive ¶¶ E2.2.1.6., E2.2.1.9.

After weighing the disqualifying and mitigating conditions and evaluating the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concern based on his falsification of the SF 86.

**FORMAL FINDINGS**

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

Paragraph 1. Guideline C (Foreign Preference): FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Paragraph 2. Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 2.a.: Against 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 Applicant a security clearance. Clearance is denied.

LeRoy F. Foreman

Administrative Judge

1. Tr. 28-30.

2. Government Exhibit 2, pp. 1-2.

3. Government Exhibit 2, p. 1; Tr. 37-38.

4. Tr. 30-31.

5. Tr. 47, 49-50.

6. Tr. 18.