KEYWORD: Foreign Preference

DIGEST: Applicant is a 56-year-old engineer who has lived abroad most of his adult life since age 23 first in England and since 1977 in Israel, where he became a citizen and served in the military. His work in Israel was for an Israeli defense contractor. He has two daughters who are adults living in Israel both of whom served in the military. He has three children in the U.S. His wife and all five children have dual nationality and hold Israeli passports. He attempted to surrender his passport to the Israeli Consulate but they have advised him that they are holding it and he will need it for travel to Israel. Clearance is denied.

CASENO: 04-03026.h1

DATE: 11/30/2005

DATE: November 30, 2005

In Re:

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

Applicant for Security Clearance

ISCR Case No. 04-03026

DECISION OF ADMINISTRATIVE JUDGE

CHARLES D. ABLARD

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 56-year-old engineer who has lived abroad most of his adult life since age 23 first in England and since 1977 in Israel, where he became a citizen and served in the military. His work in Israel was for an Israeli defense contractor. He has two daughters who are adults living in Israel both of whom served in the military. He has three children in the U.S. His wife and all five children have dual nationality and hold Israeli passports. He attempted to surrender his passport to the Israeli Consulate but they have advised him that they are holding it and he will need it for travel to Israel. Clearance is denied.

STATEMENT OF THE CASE

On November 30, 2004, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry* 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 which detailed reasons 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. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, dated April 30, 2005, Applicant responded to the allegations set forth in the SOR, and requested a hearing. The case was assigned to me on June 13, 2005, and a Notice of Hearing was issued July 18, 2005, for a hearing held on August 4, 2005. The government introduced five exhibits at the hearing and requested that administrative notice be taken of six. The Applicant introduced three multiple page documents and offered two for administrative notice. All were accepted into evidence. The Applicant, his wife, and three other witnesses testified on his behalf. The record was left open for submission by Applicant of additional evidence. The transcript was received on

August 22, 2005. The first post-hearing submission was made on August 31, 2005, and forwarded to me with comment by the government on September 22, 2005. Two additional letters were submitted by Applicant dated September 27, 2005, and submitted to me by the government on October 12, 2005, with comment.

PROCEDURAL ISSUES

Applicant's first post-hearing submission enclosed 10 items for consideration. The government had no objection to the first four, the last of which contained four pages of transcript error. Those revisions are accepted, including the government's motion to excise several lines at p. 126 of the transcript. The fifth and sixth items contain comments on the administrative notice documents of the government. The government objects to them, but I view these comments as only an articulation of similar comments by Applicant at the hearing in the form of a post-hearing brief. The government has availed itself of the opportunity of rebutting the arguments. One item which deserves mention concerns the excised lines of the transcript and argument made by Applicant relating to Applicant's fear that Department Counsel was indicating an intent to submit material ex parte to me. I did not so interpret counsel's comments in the record and no information has been so submitted, nor would any be permitted under rules of the Department and the requirements of judicial ethics.

The government objects to the introduction of items 7 and 8 consisting of newspaper articles on Asian-Americans. These have no bearing on this case and they will not be admitted. Items 9 and 10 relate to Applicant's surrender of his passport. They will be admitted and considered later in this decision. The second post-hearing submission dealt with that issue as well as the government's responsive comments in its forwarding letter to me.

FINDINGS OF FACT

Applicant admitted the factual allegations with explanatory information. Those admissions are incorporated herein as findings of fact. After a complete review of the evidence in the record and upon due consideration of the record the following additional findings of fact are made:

Applicant is a 56-year-old employee of a defense contractor working as an engineer. He has an impressive record in international defense procurement (Exhibit B). He was born in 1950 in the U.S. and educated on the west coast as a civil engineer where he was married. He lived in England from 1973 until 1977 working as a city planner for the City of London. In 1977 he and his wife moved to Israel where he was a city planner for Jerusalem until 1983. He had intended to stay only a brief time to "live out his Zionist dream" (TR. 131). However, he stayed 25 years with only a two year interruption. He became an Israeli citizen in 1982. He voted in Israeli elections but did not renounce his U.S. citizenship. As a result of his Israeli citizenship, he was drafted into the Israeli army in 1983, trained four months, and

then served two to four weeks a year until 1998, when he became inactive but served in the reserves until 2001.

In 1984, he returned to the U.S. for one year because of the illness of his father. He stayed until 1985, during which time he took training and worked in a navy yard where he held a U.S. security clearance. Upon his return to Israel, he was employed by an Israeli defense contractor, a private company some of whose stock is owned by the Government of Israel. His work involved multi-national procurement and sale of military hardware to the U.S. and other countries allied with Israel. His two daughters, born in Israel in 1983 and 1986, still live there. Both served in the Israeli army. One is now studying in the U.S. and intends to return to Israel; the second is studying in Israel. In 1986, Applicant was divorced but re-married in 1988. Three children were born of his second marriage in Israel in 1990, 1992, and1994. Applicant's second wife and five children have dual nationality and hold Israeli passports. Applicant's wife's sister and her family are citizens and residents of Israel.

In 2002, Applicant's wife convinced him to return to the U.S. for the safety of the younger children because of the Intifada occurring in Israel. After a brief stay in London with his sister who holds dual nationality with the United Kingdom and Israel, they returned to the U.S. where he obtained employment with a U.S. defense contractor. He has held an Israeli passport for many years and last renewed it in 2001. He used it to enter and exit the U.S. on three occasions in 2001 and 2002. He has given his passport to the Israeli Consulate in Philadelphia (Item 10 post-hearing submission). They responded saying that it was being held at the consulate and that he would need it for future travel to Israel. Since returning to the U.S., Applicant and his wife have returned once to Israel. While they were living in Israel they returned to the U.S. every year.

Applicant has approximately $20,000.00 of funds in Israel and will be entitled to retirement of $700.00 per month from the Israeli defense contractor for whom he worked upon reaching age 67.

Applicant is highly regarded by his employer who desires to transfer him to work requiring a security clearance. Applicant's job evaluations are excellent. Applicant shows knowledge of and awareness of the requirements of a security clearance and reporting requirements for any overtures of anyone seeking information.

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.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (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 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. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

Initially, the government must establish, by something less than a preponderance of the 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. The applicant then bears the burden of demonstrating that it is clearly consistent with the national interest to grant or continue the applicant's clearance. "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* Executive Order No. 12968 § 3.1(b).

"A security risk may exist when an individual's immediate family 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." Directive, ¶ E2.A2.1.1. Having immediate family members who are citizens of, and residing in a foreign country, may raise a disqualifying security concern. Directive, ¶ E2.A2.1.2.1.

CONCLUSION

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 all allegations set forth in the SOR:

The applicable Guidelines concerning Guideline B Foreign Influence provides as a Disqualifying Condition (DC) that a security risk may exist when an individual's foreign associates to whom he has close ties of affection or obligation are not citizens of the United States or may be subject to duress. (E2.A2.1.1.) Such facts could create the potential for foreign influence that could result in the compromise of classified information.

Conditions under Guideline B 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 in a foreign country. (E2.A2.1.2.1.) Possible mitigating conditions (MC) that might be applicable are a determination that the associates in question 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 persons involved and the U.S.(E2.A2.1.3.1.)

Based on the evidence of record, including Applicant's admissions, the government established reasons to deny her a security clearance because of foreign influence. Having established such reasons, the Applicant had the burden to establish security suitability through evidence which refutes, mitigates, or extenuates the disqualification and demonstrates that it is clearly consistent with the national interest to grant a security clearance. ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

Applicant has shown that his family members are not agents of a foreign power, but because of the number of close relatives, including two adult children who have been members of the Israeli military, it has not, and probably could not be shown, that they might not be subject to the pressures envisioned by the guideline. (E2.A2.1.3.1.) His contacts with them are not casual and infrequent, and because of the consanguinity of the relations, they could not be. (E2.A2.1.3.3.) His bank account, while not enormous, is large enough to not be "minimal" as the guideline requires, but in view of the Applicant's testimony about his assets, it is not sufficient to affect his security responsibilities. (E2.A2.1.3.5.) The same is true of prospective retirement pay. No other mitigating factors are applicable.

The applicable guidelines for Foreign Preference Guideline C provide that an individual who acts in such a way as to indicate a 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.

Conditions that could raise a security concern and may be disqualifying include the exercise of dual citizenship (E2.A3.1.2.1.), and the possession and/or use of a foreign passport. (E2.A3.1.2.2.) Security concerns may be mitigated by a willingness to renounce dual citizenship (E2.A3.1.3.4.) and return or invalidation of a foreign passport.

The critical factor regarding this guideline is the holding of an Israeli passport. Applicant's earlier statements and correspondence indicated reluctance to surrender that passport as is required by the Assistant Secretary of Defense Memorandum dated August 16, 2000. He has since made an effort to surrender it to the Israeli Consulate supported by a letter from his employer. However, the consulate's letter of response to his effort has been to indicate that it was being held at the consulate and that he would need it if and when he returned to visit Israel. This apparently is because the Government of Israel does not now and will continue to consider him an Israeli citizen. Thus, the surrender requirements of the Memorandum have not been met. Another factor is the military service performed by Applicant. This service was not strictly voluntary since he was required as a holder of Israeli citizenship granted to him the year before his service began; however, he performed it as a result of his voluntary application for citizenship upon becoming eligible to obtain it. No mitigating conditions are applicable.

In all adjudications the protection of our national security is of paramount concern. Persons who have access to classified information have an overriding responsibility for the security of the nation. The objective of the security clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. The "whole person" concept recognizes that we should view a person by the totality of their acts and omissions. Each case must be judged on its own merits taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

Applicant is an impressive person who has led an interesting and productive life. He is a devoted family man and a skilled engineer as his testimony and that of his witnesses illustrated. However, he decided at a young age to fulfill a dream of Zionism and has lived, for all practical purposes, most of the last 32 years abroad and the largest segment of that time in Israel. Although Israel is an ally of the United States and a country with which the U.S. has shared goals, it is also a country that has in the past and is likely in the future to seek technical information from other countries. The length of time Applicant lived in Israel and the family connections he has there convinces me that a security clearance should not be granted at this time. After considering all the evidence in its totality and as an integrated whole to focus on the whole person of Applicant, I conclude that it is not clearly consistent with the national interest to grant clearance to Applicant.

FORMAL FINDINGS

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

Paragraph l Guideline B: 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.: For Applicant

Subparagraph 1.h.: For Applicant

Paragraph 2 Guideline C: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

Subparagraph 2.e.: Against Applicant

Subparagraph 2.f.: Against Applicant

Subparagraph 2.g.: Against Applicant

Subparagraph 2.h.: Against Applicant

Subparagraph 2.i.: Against Applicant

Subparagraph 2.j.: Against Applicant

Subparagraph 2.k.: Against Applicant

Subparagraph 2.l.: Against Applicant

Subparagraph 2.m.: Against Applicant

Subparagraph 2.n.: Against Applicant

Subparagraph 2.o.: Against Applicant

Subparagraph 2.p.: Against Applicant

DECISION

After full consideration of all the facts and documents 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.

Charles D. Ablard

Administrative Judge