

DATE: November 23, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-11641

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Stephanie C. Hess, Esq., Department Counsel

FOR APPLICANT

Richard Murray, Esq.

SYNOPSIS

Applicant was born in Israel of Israeli parents and is now a naturalized U.S. citizen. He renounced his Israeli citizenship and surrendered his Israeli passport. His mother, two sisters, an uncle, and four childhood friends are citizens and residents of Israel. Applicant visits his mother, who is in a nursing home and mentally deteriorating, once or twice a year. He contacts his sisters, uncle, and childhood friends while in Israel, but this contact is ancillary to visiting his mother. None of his immediate family members are connected to the Israeli government or businesses likely to be involved in economic or industrial espionage. Security concerns based on foreign preference and foreign influence are mitigated. Clearance is granted.

STATEMENT OF THE CASE

On February 24, 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 B (Foreign Influence) and C (Foreign Preference).

Applicant answered the SOR in writing on March 8, 2005, admitted the allegations, offered explanations, and requested a hearing. The case was assigned to me on July 27, 2005 and heard as scheduled on September 28, 2005. Applicant and his wife (ISCR Case No. 04-10519) requested a joint hearing on their applications for clearances. I denied the motion because of the differences in factual allegations and applicable guidelines. DOHA received the transcript (Tr.) on October 17, 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 was born in Israel of Israeli parents. He served his mandatory military service in the Israeli armed forces from August 1974 until September 1978. He came to the U.S. in 1981 to further his education and obtained a master's degree in computer science in 1983. In 1987 he founded his own data systems company, of which he is president and chief executive officer. He and his wife are the sole owners of the company.

Applicant became a U.S. citizen in December 1991 and obtained a U.S. passport. He used his U.S. passport for all foreign travel but travel to Israel, because the Israeli government requires all Israeli citizens to use an Israeli passport to enter and exit Israel. Except for using his Israeli passport, Applicant did not exercise Israeli citizenship or have any connection with the Israeli government after becoming a U.S. citizen. Applicant renounced his Israeli citizenship in April 2002. His renunciation was accepted on August 7, 2002, and he surrendered his Israeli passport at that time. ⁽¹⁾

Applicant's company has been a defense contractor for about 15 years. An administrative judge granted him an ADP clearance on August 19, 2002. ⁽²⁾ His company received a facility clearance on July 26, 2005. ⁽³⁾

Applicant has been married since October 1982. His wife was a citizen of the Netherlands until she became a naturalized U.S. citizen in November 2002. They have two children who are native-born U.S. citizens.

Applicant traveled to Israel in 1994, 1996, three times in 1997, 1998, 1999, twice in 2003, and twice in 2004 to visit his family. ⁽⁴⁾ His father recently died after a long illness. His mother, two sisters, and an uncle are citizens and residents of Israel.

Applicant's mother is in a nursing home in Israel. Applicant speaks with her weekly, but their conversations are not typical mother-son conversations, because Applicant's mother is deteriorating mentally. ⁽⁵⁾

One of Applicant's sisters is a graphic designer, and the other is a homemaker. Neither has any connection with the Israeli government. He speaks with his sisters "every few months," usually about his mother's condition. ⁽⁶⁾

Applicant's uncle works for a marketing company in Israel. In a sworn statement to a security investigator in May 2001, Applicant stated he had e-mail contact with his uncle two or three times a week. However, at the hearing Applicant testified he now speaks with his uncle "very infrequently," only when he visits Israel. ⁽⁷⁾ Applicant's wife testified there is not "much of any relationship" between Applicant and his uncle at present, but there were conversations between them before Applicant's mother moved into a nursing home. ⁽⁸⁾

Applicant maintains e-mail contact with four childhood friends who are citizens and residents of Israel, and he has personal contact once or twice a year when he goes to Israel to visit his mother. His only connection with these friends is their common bond of having lived in the same community and attended the same school. Applicant testified he "probably has hundreds of friends in the United States that are 10,000 [times] more close than these people." ⁽⁹⁾

Israel is a multiparty parliamentary democracy. Its unicameral parliament elects the president, who in turn selects the prime minister. It has an independent judicial system that includes secular and religious courts. ⁽¹⁰⁾

Israel has strict security measures, including prolonged questioning and detailed searches during entry and exit. During searches and questioning, Israeli authorities have denied U.S. citizens access to U.S. consular officials, lawyers, and family members.

Terrorist acts in Israel, Jerusalem, the West Bank, and Gaza have resulted in injuries or deaths of U.S. citizens. ⁽¹¹⁾ Numerous significant international terrorist acts occurred in Israel, Gaza, and the West Bank during 2003. ⁽¹²⁾

The Israeli government generally has a good human rights record respecting its own citizens. There have been problems, however, in some areas, especially regarding treatment of Arab citizens and detention and interrogation of Palestinians. ⁽¹³⁾

Israel is considered an ally of the U.S., even though there is no mutual defense agreement between the two countries. The two countries have had major disagreements about Israel's efforts to acquire and export sensitive defense technology. Israeli espionage activities in the U.S. and illegal technology transfers to Israel by U.S. companies have caused tension between the two countries. ⁽¹⁴⁾

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

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), possesses or uses a foreign passport (DC 2), or performs military service for a foreign country (DC 3). Directive ¶¶ E2.A3.1.2.1., E2.A3.1.2.2., E2.A3.1.2.3. I conclude all three disqualifying conditions are established.

Applicant established several mitigating conditions (MC). 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 Israeli parents.

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 established for Applicant's mandatory military service in the Israeli armed forces, which occurred before he became a U.S. citizen; however, it is not established for his use of a foreign passport after he became a U.S. citizen.

When 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 Israeli passport in 2002.

MC 4 applies if the individual has expressed willingness to renounce dual citizenship. Directive ¶ E2.A3.1.3.4. This condition was met when Applicant renounced his Israeli citizenship in 2002.

Applicant has clearly demonstrated his preference for the U.S. His sole exercise of dual citizenship was his use of an Israeli passport to visit his mother in Israel. In 2002, when he learned his dual citizenship and an Israeli passport posed problems, he promptly renounced his Israeli citizenship and surrendered his passport. I conclude the security concern based on foreign preference is mitigated.

Guideline B (Foreign Influence)

A security risk may exist when an applicant's immediate family, or 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. Directive ¶ E2.A2.1.1. A disqualifying condition (DC 1) may arise when "[a]n immediate family member [spouse, father, mother, sons, daughters, brothers, sisters], 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. The totality of an applicant's family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003).

In cases where an Applicant has immediate family members who are citizens or residents of a foreign country or who are connected with a foreign government, a mitigating condition (MC 1) may apply if "the immediate family members . . . 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 ¶ E2A2.1.3.1.

Notwithstanding the facially disjunctive language of MC 1 ("agents of a foreign power **or** in a position to be exploited"), it requires proof "that an applicant's family members, cohabitant, or associates in question are (a) not agents of a foreign power, **and** (b) not in a position to be exploited by a foreign power in a way that could force the applicant to choose between the person(s) involved and the United States." ISCR Case No. 02-14995 at 5 (App. Bd. Jul. 26, 2004); *see* 50 U.S.C. § 1801(b) (defining "agent of a foreign power"). Since the Government produced substantial evidence to establish DC 1, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15.

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004). Although Israel historically has been regarded as friendly to the U.S., the distinctions between friendly and unfriendly governments must be made with caution. Relations between nations can shift, sometimes dramatically and unexpectedly.

Furthermore, friendly nations can have profound disagreements with the United States over matters they view as

important to their vital interests or national security. Finally, we know friendly nations such as Israel have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. *See* ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Nevertheless, the nature of a nation's government, its relationship with the U.S., and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence operations against the U.S.

Applicant's primary tie to Israel is his mother. She is not connected with the Israeli government. Israel has a good human rights record with respect to its own citizens, and thus is unlikely to resort to abuse or coercion of Applicant's mother. Although her age and poor health normally would not be considered mitigating factors, her deteriorating mental condition makes it unlikely she would be able or willing to be involved in any efforts to indirectly influence Applicant. Applicant's sisters are not connected to the Israeli government or industries involved in high technology or national defense. Applicant's contacts with his sisters are focused on the condition of his mother. Applicant's travel to Israel is related to his family ties and has no independent security significance. I conclude MC 1 is established for Applicant's immediate family.

A mitigating condition (MC 3) may apply if "[c]ontact and correspondence with foreign citizens are casual and infrequent." Directive ¶ E2.A2.1.3.3. There is a rebuttable presumption that contacts with an immediate family member in a foreign country are not casual. ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002). Applicant speaks to his sisters "every few months" about their mother. These conversations are not "infrequent" and Applicant has not rebutted the presumption they are not casual. Accordingly, I conclude MC 3 is not established for Applicant's sisters.

While Applicant had more frequent e-mail contact with his uncle in the past when his mother was ailing and about to move into a nursing home, those contacts now are less frequent and occur only in connection with Applicant's visits to his mother in Israel. Because an uncle is not "immediate family," there is no presumption regarding the quality of the contacts. I conclude MC 3 is established for Applicant's uncle.

The frequency of Applicant's e-mail contacts with his childhood friends is unclear, but it is clear his e-mail and personal contacts are casual. I conclude MC 3 is only partially established for these friends.

None of the individual family circumstances discussed above are determinative. They must be considered together under the "whole person concept" mandated by the Directive ¶ E2.2.1. The Appeal Board has made it clear that an applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the Government.⁽¹⁵⁾ Nevertheless, Applicant's evidence of his family's absence of governmental connections, financial dependence on the government, or business connections susceptible to industrial espionage is relevant and encompassed in the "whole person concept."

The nature of Israel's government, its human rights record, and its relationship with the U.S. are clearly not determinative. Nevertheless, they are all relevant factors in determining whether Israel would risk damaging its relationship with the U.S. by exploiting or threatening its private citizens in order to force a U.S. citizen to betray the U.S.

Applicant was granted an ADP clearance in 2002 and recently received a facility clearance. While a previous favorable clearance decision does not estop the government from denying a clearance, it is relevant that Applicant has been twice judged and found suitable for a clearance. Virtually nothing has changed since the 2002 clearance decision, except for his s mother's mental deterioration. After weighing the disqualifying and mitigating conditions, evaluating each family member's individual circumstances as well as the totality of Applicant's ties to Israel, and making a commonsense evaluation of the evidence, I conclude the security concern based on foreign influence is mitigated.

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

Paragraph 2. Guideline B (Foreign Influence: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Clearance is granted.

LeRoy F. Foreman

Administrative Judge

1. Government Exhibit (GX) 4; Applicant's Exhibit (AX) C.
2. ADP Case No. 01-17630, August 19, 2002, admitted in evidence as AX A.
3. AX D.
4. Government Exhibit (GX) 2, p. 5.
5. Tr. 40, 59-60.
6. Tr. 37-38.
7. *Id.*
8. Tr. 60-61.
9. Tr. 55.
10. Hearing Exhibit (HX) I, pp. 1, 5.
11. HX II, pp. 3-4; HX III, p. 1.
12. A "significant international terrorist incident" is defined as an incident resulting in loss of life, serious personal injury, or property damage more than \$10,000, or an act or attempt reasonably expected to do so. U.S. Dept. Of State, *Patterns of Global Terrorism* 1 (Jun.22, 2004), attached to the record as HX V.
13. HX IV, p. 1.
14. HX VI at CRS 10-11, 14-15.
15. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

