

DATE: October 25, 2006

---

In re:

-----

SSN: -----

Applicant for Trustworthiness Position

---

ADP Case No. 05-12896

## **DECISION OF ADMINISTRATIVE JUDGE**

**ERIN C. HOGAN**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Melvin A. Howry, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant is a dual citizen of the United States and Israel. Two of her children and four grandchildren are dual citizens of the United States and Israel residing in Israel. Her two sisters are citizens of and reside in Israel. Her contact with her family members cannot be described as casual and infrequent. However, foreign influence concerns are mitigated. Applicant's family members residing in Israel are not agents of a foreign power. She has lived in the United States for 27 years and has 10 year history of superior work performance with her current employer. Her refusal to surrender her Israeli passport fails to mitigate foreign preference concerns. Applicant's eligibility for assignment to a sensitive position is denied.

### **STATEMENT OF CASE**

On August 4, 2003, Applicant submitted an application for a position of public trust - an ADP I/II/III position. The Defense Office of Hearings and Appeals (DOHA) declined to grant the application under Department of Defense Regulation 5200.2-R, *Personnel Security Program*, (Jan 1987), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (the "Directive").  
[\(1\)](#) On March 20, 2006, DOHA issued Applicant a Statement of Reasons (SOR) detailing the basis for its decision. The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline B, Foreign Influence, and Guideline C, Foreign Preference.

In a sworn statement dated April 12, 2006, Applicant responded to the SOR allegations and requested a hearing. The case was assigned to me on June 28, 2006. A notice of hearing was issued on July 3, 2006, scheduling the hearing for July 26, 2006. The hearing was conducted on that date. The government submitted ten exhibits that were marked as Government Exhibits (Gov Ex) 1-10, and admitted without objection. I took administrative notice of a November 19, 2004, memorandum from the Deputy Under Secretary of Defense for Counter-Intelligence and Security regarding the adjudication of trustworthiness cases. Applicant testified on her own behalf, presented one witness, and submitted two exhibits which were marked and admitted without objection as Applicant Exhibits (AE) A-B. DOHA received the

hearing transcript (Tr.) on August 4, 2006.

## FINDINGS OF FACT

In her SOR response, Applicant denies that the overall concerns under Guidelines B and C apply to her but admits the specific allegations under Guideline C, ¶¶ 1.a -1.e, and Guideline B, ¶¶ 2.a - 2.c. She denies the allegations under Guideline C, ¶¶ 1.f and 1.g. Applicant's admissions are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 57 years old and is employed as a project manager with a Department of Defense contractor. She is seeking a position of public trust. She has worked for her current company since September 2005. From February 1997 to September 2005, she worked as a subcontractor for the same company.<sup>(2)</sup> She is divorced and has three grown children and seven grandchildren. She is a registered nurse.<sup>(3)</sup>

Applicant was born in Israel. She moved to the United States in 1979. She became a United States citizen in 1992.<sup>(4)</sup> After becoming a United States citizen, she continued to maintain an Israeli passport. She uses her United States passport upon exit and entry into the United States and her Israeli passport upon exit and entry into Israel. She uses her Israeli passport because she is required to do so under Israeli law.<sup>(5)</sup> She has traveled using her Israeli passport approximately seven times.<sup>(6)</sup>

At hearing, the government introduced a partial copy of Applicant's Israeli passport which had an expiration date of June 5, 2004.<sup>(7)</sup> Applicant renewed her Israeli passport. It expires in August 2006.<sup>(8)</sup> She intends to renew her Israeli passport once it expires.<sup>(9)</sup> She is not willing to surrender her Israeli passport. She is not willing to renounce her Israeli citizenship.<sup>(10)</sup> Although aware of the August 16, 2000, memorandum from the Assistant Secretary of Defense, Command, Control Communications, and Intelligence (ASD/C3I, also known as the Money memo) which deals with possession of a foreign passport, Applicant will not surrender her Israeli passport because she believes the Money memo is an aggregation of the Directive's mandate that administrative judges weigh all the relevant factors, including those listed and those not listed by the regulations, in searching a common sense determination regarding the applicant's security risk. She believes the Money memo ignores whole person factors and does not specifically define 'sanction.'<sup>(11)</sup>

Applicant maintains dual citizenship with Israel because Israel is the country of her birth and she has strong feelings for her home country.<sup>(12)</sup> In a signed sworn statement dated March 11, 2004, she indicated that her primary allegiance was to Israel but she can remain loyal to Israel and the United States.<sup>(13)</sup> In a subsequent affidavit, dated January 4, 2005, Applicant states, "I have maintained my Israeli citizenship because I see myself as an Israeli citizen living in the U.S. for financial reasons because I work in the U.S."<sup>(14)</sup> At hearing, Applicant testified that her feelings have changed. She now considers herself primarily a United States citizen and the United States is her home.<sup>(15)</sup>

Applicant has lived in the United States for 27 years. She has no financial interests in Israel. She does not own property or pay taxes in Israel. She has not voted in Israel since 1979.<sup>(16)</sup> She has never served in the Israeli military.<sup>(17)</sup> No foreign nationals have ever approached her with requests or threats directed at the United States. She has not engaged in activity which would make her vulnerable to duress or coercion.<sup>(18)</sup> She has been trained about policies regarding foreign contacts by her company. She will comply with the rules if she is ever contacted by a foreign entity. She has never had any negative contact with Israeli government officials during her trips to Israel.<sup>(19)</sup>

Applicant's son and daughter-in-law and daughter and son-in-law are dual citizens of the United States and Israel, who currently reside in Israel. Her son and daughter-in-law are physical therapists. They have two children. Her daughter and son-in-law work as information technology project managers for a private company. They have two children. Both families live in the Tel Aviv area. Applicant telephones her children who live in Israel between one and five times per month.<sup>(20)</sup>

Applicant's two sisters are citizens of and reside in Israel. One sister lives in Haifa. She is a registered nurse who works

in a hospital. The other sister lives in Jerusalem and works as a physical therapist. Her husband works for IBM. (21) She contacts her sisters between two to seven times per year. (22) She is close to her sisters. Both of her sisters have children. Applicant has little contact with her nieces and nephews. (23)

Applicant is highly regarded at work. Her supervisor testified at the hearing and provided a statement. (24) She has worked with Applicant since 1997. She was her second level supervisor for most of that time but became her direct supervisor when Applicant was promoted last year. Her supervisor ranks Applicant in the top 5% of the eight employees she supervises. She indicates that the sensitive information they use at work is a database which contains the demographics of military members as well as military members' and their dependents' personal health information. (25) She states that Applicant has demonstrated the highest of ethical practices in dealing with sensitive cases and material. She notes Applicant's character is above reproach and she is a trustworthy individual. (26)

## POLICIES

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." (27) The President provided that eligibility for access to classified information shall be granted only 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." (28)

To be eligible for assignment to sensitive duties, an applicant must meet the security guidelines contained in DoD 5200.2-R and DoDD 5220.6. "The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, the person's loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security." (29) The Regulation sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. (30) The adjudicative guidelines at issue in this case are:

**Guideline B - Foreign Influence:** A security risk 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 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. Contacts with citizens of other foreign countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure. (Directive ¶ E2.A2.1.1.)

**Guideline C - Foreign Preference:** When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States. (Directive ¶ E2.A3.1.1.)

Conditions that could raise a security concern and may be disqualifying (DC), as well as those which could mitigate (MC) security concerns pertaining to these adjudicative guidelines, are set forth and discussed in the conclusions below.

On August 16, 2000, the Assistant Secretary of Defense, Command, Control Communications, and Intelligence (ASD/C3I) issued a memorandum to clarify, Guideline C, Foreign Preference, relative to cases involving possession and/or use of a foreign passport. "The possession and use of a foreign passport in preference to a United States passport raises doubt as to whether the person's allegiance to the United States is paramount and it could also facilitate foreign travel unverifiable by the United States. Therefore, consistent application of the guideline requires that any 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." (31)

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination

that the person is eligible for a security clearance." (32) An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. (33) An administrative judge should consider the following factors: (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 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 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. (34)

DoD contractor personnel are afforded the right to the procedures contained in DoD Directive 5220.6 before any final unfavorable access determination may be made. (35) Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. (36) Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. (37) An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." (38) "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." (39) The same rules apply to trustworthiness determinations for access to sensitive positions. (40)

## CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. I make the following conclusions.

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

The Government established its case under the Foreign Preference concern. Applicant is a dual citizen of the United States and Israel. She renewed and used her Israeli passport on several occasions after becoming a United States citizen in 1992. She uses her Israeli passport when she travels to and from Israel to visit family members. Foreign Preference Disqualifying Condition (FP DC) E2.A3.1.2.1: (*The exercise of dual citizenship*) applies as well as FP DC E2.A3.1.2.2: (*Possession and/or use of a foreign passport*). By applying for and using an Israeli passport, Applicant is exercising dual citizenship.

At hearing, Applicant expressed some concerns about the validity of the Money memo. Section 5.1 of Department of Defense Directive 5220.6 gives the Assistant Secretary for Command Control, Communications and Intelligence (ASDC3I) the authority to establish adjudicative standards and issue clarifying guidance and instructions, as needed. The ASDC3I memorandum, dated August 16, 2000, (also known as the Money memo) is guidance clarifying the application of the foreign preference adjudicative guideline. The memo makes clear that it is Department of Defense policy that possession and use of a foreign passport is a disqualifying condition that contains no mitigating factor related to applicant's personal convenience, safety, requirements of foreign law, or the identity of the foreign country. In order to mitigate the disqualifying factor of possession or use of a foreign passport, an applicant must surrender the foreign passport or obtain official approval for its use from an appropriate agency of the United States government. (41)

The DOHA Appeal Board held that under the Directive, neither a DOHA Administrative Judge nor the Appeal Board has authority or discretion to ignore, disregard, or decline to apply the ASDC3I memo. The Appeal Board held DOHA Administrative Judges and this Board must make decisions "in accordance with policy, procedures, and standards established by the Directive." (42)

At the close of the record, Applicant possessed a valid foreign passport which she was not willing to surrender. Although her foreign passport expires in August 2006, she intends to renew it. There is no evidence that possession and use of her foreign passport was sanctioned by the United States government. Based on these reasons, Applicant has not mitigated the foreign preference security concern.

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

Under the foreign influence concern, a potentially disqualifying condition is raised. The Government has established that Applicant has immediate relatives who are citizens of and reside in a foreign country. Her son and his family, and her daughter and her family are dual citizens of the United States and Israel, who currently reside in Israel. Her two sisters and their extended families are citizens of and reside in Israel. As such, Foreign Influence Disqualifying Condition (FI DC) E2.A2.1.2.1: (*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*) applies.

Foreign Influence Mitigating Condition (FI MC) E2.A2.1.3.1: (*A determination that immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or 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 the loyalty to the person(s) involved and the United States*) is applicable to this case. The record evidence and the testimony at the hearing established that Applicant's family members residing in Israel are not agents of a foreign power. Applicant also has the burden to meet the second prong of FI MC 1 which is whether her relatives living in Israel would be in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to her relatives and the United States.

In analyzing whether a foreign relative is in a position of vulnerability it is necessary to assess the nature of the foreign countries involved. Israel is a parliamentary democracy. Israel and the United States have a close relationship based on shared democratic values, shared religious affinities, and security interests.<sup>(43)</sup> While Israel is an ally of the United States, there have been difficulties in U.S./Israeli relations over Israel's military sales to China, Israel's inadequate protection of United States intellectual property, and espionage-related cases.<sup>(44)</sup>

Although the risk of undue foreign influence cannot be completely ruled out as long as Applicant's family members are citizens of and reside in a foreign country, her substantial ties to the United States lead me to conclude she can be trusted to place her obligation to the United States government ahead of any sense of obligation to her family members residing in Israel. She has lived in the United States for over 27 years. She has been a United States citizen for 14 years. She has a 10 year demonstrated track record of superior service with her current employer - first as a subcontractor and then as a full-time employee. All of her financial assets are in the United States. She informs her supervisor when she travels to Israel. She has been trained on the proper reporting procedures if she is approached by foreign contacts.

I acknowledge that Applicant has close ties of affection and obligation to her family members residing in Israel. However, I find she has mitigated the foreign influence concern based on the whole person factors. I find Applicant has mitigated the Guideline B, Foreign Influence concern.

A concern remains under Guideline C, Foreign Preference, based on Applicant's possession and use of a foreign passport after becoming a United States citizen. Although evidence of mitigation is insufficient at this time, this decision should not be construed as a determination that Appellant cannot or will not attain the state of true reform and rehabilitation necessary to justify the granting of a trustworthiness determination. Should Appellant be afforded an opportunity to reapply for a trustworthiness determination in the future, she may well demonstrate persuasive evidence of trustworthiness.

In all adjudications, the protection of our national security is the paramount concern. The objective of the trustworthy determination process is the fair-minded, common sense assessment of a person's life to make an affirmative determination that the person is eligible for assignment to sensitive duties. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I have considered all the evidence and the "whole person" in evaluating Applicant's trustworthiness. An applicant with a good or even exemplary work history may engage in conduct that has negative trustworthiness implications. Although Applicant's loyalty to the United States is not in question, I am persuaded by the totality of the evidence that she failed to mitigate the trustworthiness concerns raised under Guideline C, and that it is not clearly consistent with the national interest to grant Applicant eligibility for assignment to sensitive duties. Eligibility is denied.

## **FORMAL FINDINGS**

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline C: 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: Against Applicant

Paragraph 2. Guideline B: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: For Applicant

## **DECISION**

In light of all of the evidence presented in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for assignment to sensitive duties. Eligibility is denied.

Erin C. Hogan

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended.
2. Tr. at 7-9; Gov Ex 1.
3. Tr. at 7.
4. Tr. at 48-49; Gov Ex 2 at 1.
5. Tr. at 40-41; Gov Ex 2 at 2; Gov Ex 6 at 2.
6. Tr. at 50.
7. Gov Ex 2.
8. Tr. at 49.
9. Tr. at 54.

10. Tr. at 52-53.
11. Tr. at 46-47, 53, *see also* AE B.
12. Gov Ex 2 at 1.
13. *Id.* at 3.
14. Gov Ex 6 at 1.
15. Tr. at 54-56.
16. Tr. at 42; Gov Ex 2 at 1; Gov Ex 6 at 2.
17. Gov Ex 2 at 2.
18. Gov Ex 2 at 3; Gov Ex 4 at 1.
19. Gov. Ex. 6 at 7-8.
20. Tr. at 58.
21. Tr. at 60-64; Answer to SOR.
22. Gov Ex 6 at 5.
23. Answer to SOR.
24. Tr. at 29-38; AE A.
25. Tr. at 29-38.
26. AE A.
27. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).
28. Exec. Or. 12968, *Access to Classified Information*, § 3.1(b) (Aug. 4, 1995).
29. DoD 5200.2-R, ¶ C6.1.1.1.
30. *Id.* at Appendix 8.
31. ASD/C3I Memorandum, "Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline," dated August 16, 2000.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at ¶ C8.2.1.
36. Directive , ¶ E3.1.14.
37. *Id.* at ¶ E3.1.15.

38. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

39. Directive, ¶ E2.2.2.

40. Administrative Notice Document I.

41. Gov Ex 8; (On August 30, 2006, The Department of Defense implemented revised Adjudicative Guidelines for Determining Eligibility For Access to Classified Information. The new guidelines are to be applied to security clearance and trustworthiness cases in which an SOR is issued on or after September 1, 2006. Under the new guideline, the August 16, 2000, ASDC3I memo is superseded by the new mitigating conditions under Guideline C, Foreign Preference. Among the new mitigating conditions is "use of a foreign passport is approved by the cognizant security authority." The new adjudicative guidelines do not apply to Applicant since the SOR in her case was issued prior to September 1, 2006.)

42. ISCR Case No. 01-00782 (December 19, 2003); *see also* Directive, Section 5.2.14; ISCR Case No. 99-0481(November 29, 2000) at 5 n.1.

43. Gov Ex 10.

44. *Id.*