

DATE: March 27, 2007

In re:

SSN: -----

Applicant for ADP I/II/III Position

ADP Case No. 06-07103

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Jennifer Goldstein, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, his parents, and his seven siblings were all born in the U.S. His two older sisters moved to Israel in the late 1960s. They and the children they have raised there are now citizens of and reside in Israel. Applicant's contacts with his sisters are infrequent. His relationship with his nieces and nephews and an Israeli brother-in-law is casual and even less frequent. Applicant has actually seen his sisters and their families only six times in the past 35 years. His five other siblings, three of whom served in the U.S. military, are citizens of and live in the U.S. He has mitigated the security concerns about possible foreign influence. Eligibility for an ADP I/II/III position is granted.

STATEMENT OF THE CASE

On October 24, 2004, Applicant submitted a Public Trust Position Application (SF 85P). After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding⁽¹⁾ that it is clearly consistent with the national interest to grant Applicant a position of trust. On July 26, 2006, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline B (foreign influence).

Applicant timely responded to the SOR, and requested a hearing. The case was assigned to an administrative judge on October 13, 2006, but was transferred to me on November 17, 2006. I convened a hearing on January 9, 2007, at which the parties appeared as scheduled. The parties stipulated to the admission of all seven exhibits proffered by the government (Gx. 1- 7).⁽²⁾ Applicant testified and introduced a single, nine-page exhibit (Ax. A), which was admitted without objection. DOHA received the transcript (Tr.) on January 17, 2007.

FINDINGS OF FACT

The government alleged in the SOR that two of Applicant's sisters are citizens of and reside in Israel (SOR ¶ 1.a); that the husband of one of his sisters is a citizen of and resides in Israel (SOR ¶ 1.b); that Applicant has five nieces and

nephews who are citizens of and reside in Israel (SOR ¶ 1.c); that two of his nephews are serving in the Israeli army (SOR ¶ 1.d); and that Applicant traveled to Israel in 2001 (SOR ¶ 1.e). Applicant admitted all but SOR ¶ 1.d, and his admissions are incorporated herein as facts. After a thorough review of the pleadings, transcript, and exhibits, I make the following additional findings of relevant fact:

Applicant is 49 years old and has worked as a programmer/analyst in the health care and medical insurance industry since at least 1990. Since November 1999, he worked for a company that has contracted to manage medical insurance claims and information for TriCare, the Department of Defense (DoD) medical insurance system for military personnel and their families.

In 2004, he was required, as part of his current employer's contract with DoD, to undergo a trustworthiness determination for access to the same information he has been handling since he started there. The ensuing background investigation revealed, inter alia, that Applicant's two older sisters, now in their mid-50s, are citizens of and reside in Israel. All of Applicant's family members were born and raised in the United States. Before his sisters moved to Israel in the late 1960s and started families there, Applicant's family had no connection to Israel, nor were any of them of Israeli descent.

Applicant's oldest sister moved to Israel in connection with volunteer work there. She stayed after being given a scholarship to study physical therapy at an Israeli school. She later married an Israeli, who works for a large pharmaceutical company there. They have three children, all now grown. Applicant's other older sister moved to Israel in the late 1960s under similar circumstances. She married an Israeli and raised four children, but is now divorced and working for the same pharmaceutical company as her brother-in-law. All of Applicant's nieces and nephews also have U.S. citizenship derived from their mothers' U.S. citizenship. One of the children lives in Brazil, but the rest still reside in Israel.

All Israeli citizens are required to complete two years of military service. Applicant's sisters and their children in Israel have fulfilled their military obligations. Applicant thinks, but is not certain, some of his nieces or nephews may still be subject to reserve recall. Aside from mandatory military service, none of Applicant's relatives in Israel have ever had any connection to the Israeli government.

Applicant also has four brothers and a sister who are U.S. citizens and live in the U.S. His sister is an engineer who works for a contractor in support of U.S. Navy facilities inspections. One of his brothers is a programmer for a drug testing company. Another brother served in the U.S. Air Force, and has worked for a large defense contractor for at least 25 years. Another brother served in the U.S. Navy, and now works for a large U.S. corporation as a nuclear engineer. The fourth brother served in the U.S. Army, and now works for a medical laboratory equipment company.

Applicant traveled to Israel in 1987 and 2001 to see his sisters. In the early 1990s and in 2003, one of his sisters and her family came to the U.S. to visit Applicant and other family members. One of his nieces came to the U.S. for several months in 2004, and she visited Applicant for four days before returning to Israel. Applicant's other sister visited in 2005. Applicant sends birthday cards to his sisters and speaks with them by telephone one or two times a year. He has little contact with his Israeli brother-in-law, and it is rare for him to speak with any of his nieces and nephews unless they happen to answer the phone when he calls. Applicant has a natural concern for the welfare of his brother-in-law and nieces and nephews because of their relation to his sisters, but these are not "loving relationship[s]." ⁽³⁾

Israel is one of the most active countries engaged in military and industrial espionage. Their efforts have been directed at hostile and friendly countries alike, including the United States. ⁽⁴⁾ Overall, however, their interests are generally aligned with ours, especially where matters of regional security are concerned. Since its founding in 1948, Israel and the United States have had a close friendship based, in large measure, on common democratic values. Israel has an advanced, industrial market, and its government is characterized as a "vibrant parliamentary democracy." ⁽⁵⁾

Applicant has an excellent work record. A co-worker, who has known him professionally and personally since 1990, praised his job performance and avers Applicant is trustworthy, reliable, and loyal to the United States. Applicant's performance evaluations show he exceeded his employer's goals and expectations of him in the most recent reporting period.

POLICIES AND BURDEN OF PROOF

The Directive sets forth adjudicative guidelines⁽⁶⁾ to be considered in evaluating an applicant's suitability for access to sensitive information.⁽⁷⁾ Each trustworthiness determination must reflect consideration of both disqualifying conditions (DC) and mitigating conditions (MC) under each adjudicative issue applicable to the facts and circumstances of each case.⁽⁸⁾ Each determination must also reflect a fair and impartial common sense consideration of all available relevant and material information,⁽⁹⁾ and it must reflect the adjudication process outlined in the Directive at Section E2.2.1.⁽¹⁰⁾ The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to sensitive information.

Trustworthiness determinations are intended solely to resolve whether it is clearly consistent with the national interest⁽¹¹⁾ for an applicant to receive or continue to have access to sensitive information. The government bears the initial burden of producing admissible information on which it based the preliminary decision against the applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, the burden then shifts to the applicant to refute, extenuate or mitigate the government's case. As with security clearances, no one has a "right" to such access.⁽¹²⁾ Thus, an applicant bears a heavy burden of persuasion. Access to sensitive information is a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect sensitive information pertaining to the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.⁽¹³⁾

CONCLUSIONS

Foreign Influence. The government presented sufficient evidence to support the factual allegations in the SOR. As to SOR ¶¶ 1.a, 1.b, and 1.c, two of Applicant's sisters are citizens of and reside in Israel. The husband of one of his sisters, and all but one of his nieces and nephews are also citizens of and reside in Israel. These facts raise security concerns under Guideline B; that is, 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 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.⁽¹⁴⁾ Guideline B DC 1⁽¹⁵⁾ must be considered in light of the available information about Applicant's Israeli relatives. Certainly, his sisters qualify as immediate family members, and it may initially be presumed Applicant is also tied by affection to his brother-in-law and his nieces and nephews.

As to SOR ¶ 1.d, Applicant denied this allegation and asserted his nephews have completed their military obligation. The government did not present evidence to support this controverted issue of fact,⁽¹⁶⁾ and I find this allegation for the Applicant. As to SOR ¶ 1.e, available information showed that Applicant traveled to Israel in 2001, as alleged. However, travel to a foreign country is not in and of itself disqualifying. Such allegations merely plead evidence of the strength of his ties to his sisters. I find for Applicant as to this allegation.

Weighing the fact he has traveled to Israel to see his sisters, along with other available information about his relationship with his sisters and their families, it is apparent that Applicant's contact with them over the past 35 years has been infrequent. He traveled to Israel twice; once in 1987 and once in 2001, to see his sisters. One sister traveled here twice between 1990 and 2003. The other visited once in 2005. Some of his nieces and nephews have also visited the U.S. and seen Applicant a total of three times in the past 16 years. Further, Applicant has infrequent telephone contact with his sisters each year, even less contact with his nieces or nephews, and almost no contact with his brother-in-law. On these facts, as to his brother-in-law and nieces and nephews, MC 3⁽¹⁷⁾ applies. MC 3 also is relevant when assessing the risk associated with his ties to his sisters. Their contacts are clearly infrequent, and, even allowing for the fact

Applicant cares for his sisters, their relationship is not so close as to pose an unacceptable risk to the government in this context. Applicant and his sisters have lived very separate lives for three decades or more. Applicant's sisters left home before Applicant was a teenager, and they have never returned but for the aforementioned visits. All of the foregoing leads me to conclude that they are not as close as would otherwise be presumed in a sibling relationship.

Further, available information supports application of MC 1.⁽¹⁸⁾ Despite its disjunctive wording, to apply MC 1 it must be shown Applicant's Israeli relatives are not agents of a foreign power, and are not vulnerable to exploitation by the Israeli government so that Applicant would have to choose between their well being and the interests of the United States.⁽¹⁹⁾ As to the first prong of MC 1, none of Applicant's relatives works for the Israeli government or is an agent thereof. The only official connection any of them has had is through their military obligations, but all have completed their service. Applicant thinks one or more of his sisters' children may still be subject to recall by the military, but available information on this point is inconclusive and somewhat speculative. As to the second prong involving potential for coercion, available information shows that Israel is an open society, governed through a democratically-elected legislature and executive, checked by an independent judiciary. There are no known problems regarding human rights abuses by Israel, and the U.S. and Israel enjoy close, mutually supportive relations. I am mindful of the information showing Israel is active in military and industrial espionage. Nonetheless, I conclude that there is little likelihood Israel, a nation generally friendly toward the United States, will try to leverage Applicant's relationship with his sisters or his other Israeli relatives to gain access to the information with which Applicant works. Based on the foregoing, I conclude SOR ¶¶ 1.a, 1.b, and 1.c for the Applicant, and further conclude he has mitigated the security concerns raised under Guideline B.

Whole Person. In evaluating Applicant's case, I have also considered the adjudicative process factors collectively referred to as the "whole person" concept.⁽²⁰⁾ For the same reasons that Guideline B MC 1 applies, I conclude in this context that there is little likelihood of coercion by the Israeli government because, in addition to the adjudicative factors already discussed,⁽²¹⁾ Applicant has been in the same job, and has had access without incident to the same information for which this determination is made since 1999. As a result, he has a well-established record of trustworthiness and reliability. Also probative is the fact that most of Applicant's family is rooted in the United States as five of his seven siblings, three of whom have served in the U.S. military, reside here. As a matter of common sense, the facts presented in this case do not pose an unacceptable risk to the interests of national security.

FORMAL FINDINGS

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

Paragraph 1. Guideline B: 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 of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant's request for eligibility for assignment to a sensitive position. Eligibility is granted.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. Gx. 4, 5, 6, and 7 were proffered for administrative notice only. Gx. 4, 5, and 6 were issued in 2006. Gx. 7, an annual report to Congress, was issued sometime in 2000. (Tr., 14 - 15).
3. Tr., 35 - 38.
4. Gx. 7.
5. Gx. 4 and 5.
6. Directive, Enclosure 2.
7. Department Counsel moved to amend the SOR to show that a memorandum from Carol A. Haave, Deputy Under Secretary of Defense for Counterintelligence and Security to DOHA Director, *Adjudication of Trustworthiness Cases* (Nov. 19, 2004), directed that adjudication of trustworthiness cases for ADP I, II, and III positions be resolved using the provisions of the Directive rather than, as originally drafted, DoD Regulation 5200.2-R, *DoD Personnel Security Program*, as amended (Regulation). Applicant did not object and I granted the motion. (Tr., 11) Positions designated as ADP I or ADP II are classified as sensitive positions in section AP10.2.1 of the Regulation. ADP III positions are nonsensitive positions. (Regulation, AP10.2.3.1) By virtue of the aforementioned memorandum, however, even though they are nonsensitive positions, ADP III cases are treated in the same way and adjudicated under the same guidelines and procedures as ADP I and II cases.
8. Also, Appendix 8 of the Regulation sets forth the adjudicative policy, as well as the disqualifying conditions and mitigating conditions associated with each guideline. DoD contractor personnel are afforded the adjudication procedures contained in the Directive. (Regulation, C8.2.1)
9. Directive, 6.3.
10. "The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. In evaluating the relevance of an individual's conduct, the adjudicator should consider the following factors:
 - E2.2.1.1. The nature, extent, and seriousness of the conduct;
 - E2.2.1.2. The circumstances surrounding the conduct, to include knowledgeable participation;
 - E2.2.1.3. The frequency and recency of the conduct;
 - E2.2.1.4. The individual's age and maturity at the time of the conduct;
 - E2.2.1.5. The voluntariness of participation;
 - E2.2.1.6. The presence or absence of rehabilitation and other pertinent behavioral changes;
 - E2.2.1.7. The motivation for the conduct;
 - E2.2.1.8. The potential for pressure, coercion, exploitation, or duress; and
 - E2.2.1.9. The likelihood of continuation or recurrence;"
11. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988). *See also*, Regulation, C6.1.1.1 ("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.")
12. *See Egan*, 484 U.S. at 528, 531.
13. *See Egan*; Directive, E2.2.2.
14. Directive, E2.A2.1.1.
15. Directive, 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.

16. Directive, E3.1.14.

17. Directive, E2.A2.1.3.3. Contact and correspondence with foreign citizens are casual and infrequent.

18. Directive, E2.A2.1.3.1. A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) 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 person(s) involved and the United States.

19. ISCR Case No. 02-14995 at 5 (App. Bd. July 26, 2004). (Foreign Influence Mitigating Condition 1 is bifurcated in nature and cannot be applied unless there is sufficient credible record evidence 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. (Previous citations omitted.)).

20. Directive, E2.2.1.8.

21. Department Counsel averred at hearing that the Appeal Board has held that the only potentially applicable factor to be considered in cases of possible foreign preference is whether there is potential for pressure, coercion, exploitation, or duress. (Tr., 56) While the other whole person factors pertain to conduct or specific events, making them logically inapposite to most foreign influence cases, they are not "the only ones that may be considered in performing a whole person analysis in a Guideline B case...[M]any others raised by the facts of a given case can be properly factored in to a judge's evaluation of an applicant's worthiness of a security clearance." ISCR Case 04-11414 (March 5, 2007), at 4 (citations omitted).