DATE: March 26, 2007

In re:

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

Applicant for Security Clearance

CR Case No. 06-07130

DECISION OF ADMINISTRATIVE JUDGE

ROBERT J. TUIDER

APPEARANCES

FOR GOVERNMENT

John B. Glendon, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant is a native born U.S. citizen, who holds dual citizenship with Israel. She has six siblings-in-law who are citizens and residents of Israel. Applicant has used an Israeli passport to visit Israel four times to enter and leave Israel over the past 25 years. Her Israeli passport expired in 2005. She has substantially more connections to the United States than to Israel. Her husband and three children are U.S. citizen residents. Under the "whole person" concept, she has mitigated security concerns pertaining to foreign influence and foreign preference because of her strong connections to the United States. Clearance is granted.

STATEMENT OF THE CASE

On December 23, 2004, Applicant applied for a security clearance and submitted a Security Clearance Application (SF 86).[(1)] On June 28, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to her, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, 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.[(2)]

The SOR alleges security concerns under Guideline C (Foreign Preference), and Guideline B (Foreign Influence). The SOR 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 her, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In an answer notarized on July 24, 2006, Applicant responded to the SOR allegations, and asked for a hearing.[(3)] The case was assigned to me on October 26, 2006. On November 13, 2006, DOHA issued a notice of hearing, scheduling the hearing on November 30, 2006. The hearing was conducted as scheduled. The government submitted two documentary exhibits that were admitted as Government Exhibits (GE) 1 and 2 without objection. I took administrative notice of nine additional documents offered by the government as discussed, *infra.* The Applicant testified and submitted nine

documents that were admitted as Appellant Exhibits (AE) A through I without objection. Applicant submitted one additional document post-hearing that was admitted as AE J without objection. DOHA received the transcript on December 13, 2006.

PROCEDURAL RULING

At the hearing, Department Counsel asked me to take administrative notice of Exhibits (Ex.) I to IX, U.S. Department of State, *Background Note: Israel*, May 2006; U.S. Department of State, *Israel and the occupied territories*, Country Reports on Human Rights Practices - 2005, March 8, 2006; U.S. Department of State, *Consular Information Sheet, Israel, the West Bank and Gaza*, February 8, 2006; U.S. Department of State, *Travel Warning, Israel, The West Bank and Gaza*, August 29, 2006; Congressional Research Service, Library of Congress, Report for Congress, *Israel: Background and Relations with the United States*, June 14, 2006; Interagency OPSEC Support Staff (IOSS), *Intelligence Threat Handbook* (2004); IOSS, *Intelligence Threat Handbook*, Section 5, "Economic Intelligence Collection Direction Against the United States," April 1996; National Counterintelligence Executive, *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage - 2004*, April 2005; and National Counterintelligence Center, 2000 Annual Report To Congress On Foreign Economic Collection And Industrial Espionage, respectively.

Administrative or official notice is the appropriate type of notice used for administrative proceedings. *See* ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings is to notice facts that are either well known or taken from government reports. *See* Stein, Administrative Law, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice). Applicant did not object to my consideration of Exs. I to IX for purposes of administrative notice. Tr. 15-33.

At the conclusion of the evidence, the government moved to amend ¶ 2.b. by deleting the word "cousins" and substituting the words "siblings-in-law" to conform with the evidence. Without objection from Applicant, I granted the government's motion to amend. Tr. 89-90.

FINDINGS OF FACT

As to the factual allegations, Applicant admitted the underlying facts alleged in the SOR ¶¶ 1.a. through 1.c. She admitted, in part, and clarified allegations in ¶ 2. In ¶ 2.a., DOHA alleged her parents-in-law are citizens and residents of Israel. In her answer to the SOR, she admitted her parents-in-law were citizens and residents of Israel, but are now deceased. In ¶ 2.b., DOHA alleged she had six cousins who were citizens and residents of Israel. In her answer to the SOR, Applicant denied having six cousins who were citizens and residents of Israel, but did admit to having six siblings-in-law who were citizens and residents of Israel. Her admissions are incorporated herein as findings of fact, and her clarifying remarks about security concerns will be discussed in further detail, *infra*.

Applicant is employed as an advisory software engineer for a government contractor, and has been employed by her company with a constructive start date of September 1982. Tr. 44-45, AE F. Her manager requested her to apply for a security clearance because one of the projects in her group, which was originally designed/developed for commercial application, is also applicable in the military environment. Since Applicant is the project leader, her manager requested that she apply for a security clearance should her company be awarded a contract with application to the military. Having a security clearance would also provide Applicant opportunities to work on "interesting and challenging" projects and also provide her with upward mobility. She is a first-time applicant for a security clearance. Tr. 74-75, AE J.

Applicant is 48 years old.[(4)] She was born and raised in the U.S. near a major metropolitan area. She attended a state university, majoring in mathematics, and had a dual minor in Judaic studies and computer science. She was awarded a bachelor of arts degree in May 1979. While employed full-time, she enrolled in graduate school in September 1982 at a private university and was awarded a master's degree in computer science in May 1987. Tr. 43-44.

While Applicant was in college, she spent her senior year in Israel in a study abroad program. While in Israel, she met

and married her husband, an Israeli citizen, in April 1979. After marrying her husband, Applicant became an Israeli citizen in "1979 or 1980." Tr. 52. After getting married, Applicant and her husband remained in Israel. In June 1981, her oldest son was born, and he is a dual citizen of Israel and the U.S. In December 1981, Applicant and her young son returned to the U.S. and were later joined by her husband in January 1982. In addition to having a now 25-year-old son, she also had two other children after returning to the U.S., a 22-year-old son, and a 17-year-old daughter.

Applicant's oldest son is a graduate student attending an Ivy League university studying applied physics, her second son is attending a state university, majoring in mathematics, and her daughter is a high school senior living at home and plans to study marine biology/ecology. AE C. Applicant stated all of her children have been raised to be honest, moral, and ethical in all of their interpersonal and business relationships. Her oldest son volunteers as a "Big Brother" mentoring Hispanic children in a major metropolitan area. Her second son works with the open source community and donates blood on a regular basis. Her daughter volunteers at the food pantry at the local Jewish Community Center and helps coordinate children's events at their synagogue. AE C.

After Applicant's husband immigrated to the U.S. in January 1982, he became a U.S. citizen in December 1985. He is employed as a supervisor in the Department of Probation in a major metropolitan area and holds a clearance from the Department of Homeland Security. Tr. 78-79.

Applicant holds a valid U.S. passport issued in December 1999. She previously held an Israeli passport, which she had renewed in November 1995 and which expired in October 2005. In the 25 years since Applicant returned to the U.S., she has only been to Israel four times, most recently in January/February 2000. The purpose of her most recent visit to Israel was to visit her son who was studying there between high school and college. During her visits to Israel she used her then valid Israeli passport when entering and departing Israel as required by Israeli law. Conversely, she used her U.S. passport when exiting and returning to the U.S. GE 2, Tr. 64-66. Applicant stated that, if traveling to Israel required her to renew her Israeli passport, she would not travel to Israel. Tr. 72.

As indicated, *supra,* the SOR alleged Applicant had six cousins, who are citizens and residents of Israel. As Applicant clarified in her answer to the SOR, those relatives are not cousins, but siblings-in-law. The first sibling-in-law is an unmarried woman, who works as a nursing assistant in a hostel for people with mental disabilities. Tr. 56-57. The second sibling-in-law is a married man who is a retired stock clerk from a soft drink company and receives a pension from the Israeli government. Tr. 57-58. The third sibling-in-law is a man who works for a state owned aircraft company as a research engineer. Tr. 58-59. The fourth sibling-in-law is a married woman who is a stay at home mother/homemaker. Tr. 59. The fifth sibling-in-law is a divorced woman who is a salesperson for a pharmacy. Tr. 60. The sixth sibling-in-law is a man who works as a medical technician for a hospital and also drives an ambulance. Tr. 60, AE C.

The extent of Applicant's contact with her siblings-in-law is vicariously through her husband's telephone calls with five of his siblings before holidays, and occasional telephone calls back and forth. Tr. 61-64, 70-71. Applicant is not close with any of her husband's siblings. Tr. 84-85.

Applicant derives no benefit by retaining her Israeli citizenship. Applicant further stated she would be willing to renounce her Israeli citizenship. Tr. 78. She described her dual citizenship as an "abstract emotional tie." She cited sufferings of the Jewish people and in particular family members who perished because of their heritage as a rationale for having maintained dual citizenship. Tr. 94-95.

Neither Applicant nor her husband own any real or personal property in Israel. All of their real and personal property is in the U.S., which includes a home and automobiles. Applicant conducts all her banking in the U.S. She exercises her right to vote in the U.S. and enjoys all other privileges of being a U.S. citizen only. Tr. 81-82.

Applicant provided two work-related reference letters from supervisory company officials describing her work performance as outstanding. The letters emphasized she is a conscientious and trustworthy employee. AE A and B. She also submitted a certificate of merit from her local community as well as a citation from her State Assembly recognizing her as an "outstanding citizen." Tr. 79-81, AE D and F. She submitted performance appraisals for the last three years, all of which reflected above average performance. These appraisals document in great detail the tremendous contributions Applicant has made over the years and her potential for future service. They also make it clear Applicant is a trusted and

valued employee. AE F through I. Applicant is deeply vested in the U.S., is honest, and stated she would never betray the trust of the U.S. Tr. 95.

POLICIES

In an evaluation of an applicant's security suitability, an administrative judge must consider Enclosure 2 of the Directive, which sets forth adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into disqualifying conditions (DC) and mitigating conditions (MC), which are used to determine an applicant's eligibility for access to classified information.

These adjudicative guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these guidelines in conjunction with the factors listed in the adjudicative process provision in Section E2.2, Enclosure 2, of the Directive. An administrative judge's overarching adjudicative goal is a fair, impartial and common sense decision. Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge should consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

Specifically, an administrative judge should consider the nine adjudicative process factors listed at Directive ¶ E2.2.1: (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.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to the relevant adjudicative guidelines are set forth and discussed in the Conclusions section below. Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, facts must be established by "substantial evidence."[(5)] The government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive. Once the government has produced substantial evidence of a disqualifying condition, the burden shifts to the applicant to produce evidence and prove a mitigating condition. Directive ¶ E3.1.15 provides, "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." The burden of disproving a mitigating condition never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).[(6)]

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

The scope of an administrative judge's decision is limited. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

Guideline C - Foreign Preference

Under Guideline C, a security concern may exist 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.

Foreign Preference Disqualifying Condition (FP DC) 1. *The exercise of dual citizenship;* and FP DC 2: *Possession and/or use of a foreign passport*; are acts that demonstrate a foreign preference. Applicant is a dual citizen of the U.S. and Israel, and she exercised her Israeli citizenship by obtaining and using an Israeli passport to enter Israel after she became a U.S. citizen. However, she obtained and used an Israeli passport only because of the Israeli legal requirement that mandates the use of an Israeli passport by Israeli citizens to enter and exit Israel. The purpose of these visits to Israel was to visit in-laws and, more recently, her son when he was studying in Israel in 2005.

In addition to her Israeli passport, Applicant presented her U.S. passport to customs officials in connection with her four trips to Israel over the past 25 years, so those trips would be properly made known and documented by U.S. officials. Applicant's Israeli passport expired in September 2005 and contrary to what is alleged in the SOR, Applicant does not plan to renew her Israeli passport.

The government did not allege possession of a valid Israeli passport. She has not returned to Israel since her Israeli passport expired and maintains a current U.S. passport. The Memorandum of Assistant Secretary of Defense Arthur L. Money, dated August 16, 2000 hereinafter "ASDC3I memorandum" mandates that, "consistent application of the guideline requires that any clearance 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."

The Appeal Board has indicated in ISCR Case No. 03-10390 at 3-4 (App. Bd. Apr. 12, 2005) that the ASDC3I memorandum requirement to surrender a passport also applied to expired passports. Moreover, the passport cannot be surrendered to a Department of Defense security officer, it must be surrendered to the issuing authority. ISCR Case No. 03-06174 at 3-5 (App. Bd. Feb. 28, 2005).

There is no allegation concerning the failure to surrender the Israeli passport under Guideline C (foreign preference) in this case. "[T]here is no question that Applicant was entitled to receive reasonable notice of the reasons why DOHA proposed to deny or revoke [her] access to classified information, as well as a reasonable opportunity to respond." ISCR Case No. 03-06174 at 3 (App. Bd. Feb. 28, 2005) (citations omitted).

Since Applicant's SOR was issued, revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005) (hereinafter "Revised Guidelines") took effect on September 2, 2006. Under Guideline C (Foreign Preference) of the Revised Guidelines, paragraph 10(a)(1) the first disqualifying condition states, "possession of a current foreign passport (emphasis added)," effectively overruling the Appeal Board's expansive interpretation of the ASDC3I memorandum as applicable to expired passports. The President's approval of revised adjudicative guidelines was forwarded in a emorandum from the Assistant to the President for National Security Affairs to the Director, Information Security Oversight Office on December 29, 2005. This memorandum asked the Director to, "[p]lease circulate the revised guidelines to all affected agencies for immediate implementation."

The revised guidelines were implemented within DoD by an Under Secretary of Defense Memorandum dated August 30, 2006. This Memorandum makes the revised Guidelines applicable to all adjudications and other determinations in which an SOR is issued after September 1, 2006, and requires that all SORs issued prior to September 1, 2006 be adjudicated under the previous Guidelines. Applicant's case must be adjudicated under the previous Guidelines because on June 28, 2006, Applicant's SOR was issued. ISCR Case No. 03-17839 at 8 (App. Bd. Nov. 24, 2006) (White, J.

separate opinion)(explaining purpose for delayed implementation is to ensure applicant's have notice of particular guidelines in effect at the time the SOR is issued). However, assuming the Revised Guidelines improve and support national security objectives, and an Applicant is not prejudiced by the change, an Applicant should be able to urge the DoD to apply the Revised Guidelines, when they are not inconsistent with the previous Guidelines, or when they clarify application of the Guidelines. I conclude that the ASDC3I memorandum does not bar Applicant's clearance because of her possession of an expired Israeli passport.

Applicant acquired her Israeli citizenship as a young woman in conjunction with marrying her Israeli husband and living with him in Israel for a short time 25 years ago. At such a young age, she could not have foreseen this action would have lead to such complications later in her life. In this case, Applicant expressed a willingness to renounce to Israeli citizenship and is able to invoke Foreign Preference Mitigating Condition (FP MC) 4: *Individual has expressed a willingness to renounce dual citizenship*. The facts of this case do not support application of other FP MCs under this concern.

Guideline B - Foreign Influence

Under Guideline B, 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." Directive ¶ E2.A2.1.1.

This allegation is tenuous based on the fact Applicant has six siblings-in-law living in Israel with whom she has limited contact, and such contact in large part is maintained vicariously through her husband. SOR ¶ 2.a. alleged Applicant's parents-in-law are citizens and residents of Israel. This concern is no longer valid because both her parents-in-law are deceased. Two of eight possible foreign influence disqualifying conditions (FI DC) could raise a security concern in this case. FI DC 1 applies where 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." Directive ¶ E2.A2.1.2.1. "Immediate family members" include a spouse, father, mother, sons, daughters, brothers, and sisters. Directive ¶ E2.A2.1.3.1. Although Applicant's siblings-in-law are not "immediate family members" as defined by the Directive, they can be said to be individuals with whom she has "close ties of affection or obligation." The government produced evidence to establish FI DC 1 because Applicant's siblings-in-law are Israeli citizens, and they currently live in Israel. FI DC 3 applies where an applicant has, "relatives, cohabitatants, or associates who are connected with any foreign government." Directive ¶ E2.A2.1.2.3. FI DC 3 is applicable because her second sibling-in-law is retired and receiving a pension from the government of Israel.

Although, the mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B, if only one relative lives in a foreign country, and an applicant has contacts with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. *See* ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001). Because FI DCs and 1 and 3 apply, Applicant has the burden to present evidence of rebuttal, extenuation or mitigation to show that it is clearly consistent with the national interest to grant her a security clearance.

Once the government meets its burden of proving controverted facts[(7)] the burden shifts to an applicant to present evidence demonstrating extenuation, mitigation, or changed circumstances.[(8)] Further, the government is under no duty to present evidence to disprove any Adjudicative Guideline mitigating conditions, and an administrative judge cannot assume or infer that any particular mitigating condition is applicable merely because the government does not present evidence to disprove that particular mitigating condition.[(9)]

Security concerns based on foreign influence can be mitigated by showing the applicability of one or more foreign influence mitigating conditions (FI MC). FI C 1 recognizes that security concerns are reduced when there is "[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." Directive ¶ E2.A2.1.3.1. Notwithstanding the facially disjunctive language of FI MC 1, the Appeal Board has decided that Applicant must prove that his family members, cohabitant or associates are not agents of a foreign power, and are not in a position to be exploited by a foreign power in a way that could force Applicant to chose between the person(s) involved and the United States. ISCR Case No. 02-14995 at 5 (App. Bd. July 26, 2004). Applicant satisfies the first prong of FI MC 1 even under the Appeal Board's very broad definition of "agent of a foreign power."[(10)] Also, the Appeal Board has specifically indicated that receipt of a foreign pension does not cause a person to be an agent of a foreign power.[(11)]

The second prong of FI MC 1 provides that it is potentially mitigating where the "associate(s) in question are not . . . 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 involved and the United States." The Appeal Board interprets this language as establishing an absolute standard; i.e., an applicant must affirmatively prove that there is *no possibility* that anyone might attempt to exploit or influence a foreign relative or acquaintance in the future. *See* ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006) ("[FI MC] 1 does not apply because, as is well settled, it requires that Applicant demonstrate that his relatives are not in a position which could force Applicant to choose between his loyalty to them and his loyalty to the United States."); ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2005).

The nature of a Israel's government, its competitive relationship with the United States, its history of espionage against the United States, and the prevalence of terrorism are all relevant in assessing the likelihood that Applicant's family members are vulnerable to coercion, persuasion, or duress. As indicated *infra*, Israel has a complicated relationship to the U.S. The Appeal "Board has warned 'against reliance on overly simplistic distinctions between 'friendly' nations and 'hostile' nations when adjudicating cases under Guideline B.'"[(12)] In any event, Applicant should not be placed into a position where she may be forced to choose between loyalty to the United States and her siblings-in-law living in Israel.[(13)] Additionally, a foreign government could bring pressure on her by terminating her sibling-in-law's pension. *See* ISCR Case No. 03-06267 at 4 (App. Bd. Jan. 24, 2006); ISCR Case No. 02-30535 at 4 (App. Bd. May 4, 2005). Thus, FI MC 1[(14)] cannot be applied.

FI MC 3 can mitigate security concerns where "contact and correspondence with foreign citizens are casual and infrequent." Directive ¶ E2.A2.1.3.3. Applicant's contacts are limited to occasional telephone contact, but more accurately her contact is vicariously maintained through her husband's telephone calls back and forth to family members in Israel.

Applicant has failed to establish that her contacts with her siblings-in-law are casual under the definition established by the Appeal Board. *See* ISCR Case No. 04-00540 at 6 (App. Bd. Jan. 7, 2007). The term "casual" means a contact that is "more fortuitous in nature than planned or designed" or "resulting from, or occurring by chance." ISCR Case No. 04-08870 at 3 n.1 (App. Bd. Nov. 29, 2006). Arguably this definition of "casual" is inconsistent with the Directive, as it so narrows the applicability of FI MC 3 that it would only be applicable in very rare circumstances. In any event, I must follow the directions of the Appeal Board and accordingly, I conclude that FI MC 3 cannot be applied.

Applicant does not have any financial interests in Israel. This fact does not mitigate the foreign influence concerns based on FI DC 1 or 3. *See* ISCR Case No. 04-02233 at 3 (App. Bd. May 9, 2006).

I conclude that no Guideline B Mitigating Conditions apply, and I expressly and specifically indicate that I have not relied "explicitly or implicitly" on any of the itigating Conditions listed under Guideline B of the Directive. *See* ISCR Case No. 04-00540 at 6 (App. Bd. Jan. 7, 2007).

Once the government meets its burden of proving controverted facts[(15)] the burden shifts to an applicant to present evidence demonstrating extenuation, mitigation, or changed circumstances.[(16)] Further, the government is under to duty to present evidence to disprove any Adjudicative Guideline mitigating conditions, and an administrative judge cannot assume or infer that any particular mitigating condition is applicable merely because the government does not present evidence to disprove that particular mitigating condition.[(17)]

The following information about Israel is significant in determining whether a security concern exists under the known facts of this case:

Background and Relations with the United States. Since 1948, the United States and Israel have developed a close friendship based on common democratic values, religious affinities, and security interests. U.S. - Israeli bilateral relations are multidimensional. The United States is the principal proponent of the Arab-Israeli peace process, but U.S. and Israeli views differ on various peace process issues, such as the fate of the Golan Heights, Jerusalem, and Israeli settlements. The United States and Israel concluded a free-trade agreement in 1985, and the United States is Israel's largest trading partner. Since 1976, Israel has been the largest recipient of U.S. foreign aid. The two countries also have very close security relations.

Current issues in U.S. - Israeli relations include Israel's military sales to China, inadequate Israeli protection of U.S. intellectual property, and espionage-related cases.[(18)]

Espionage - Related Cases. In November 1985, Jonathan Pollard, a civilian U.S. naval intelligence employee, and his wife were charged with selling classified documents to Israel. Four Israeli officials also were indicted. The Israeli government claimed that is was a rogue operation. Pollard was sentenced to life in prison and his wife to two consecutive five-year terms. She was released in 1990, moved to Israel, and divorced Pollard. Israelis complain that Pollard received an excessively harsh sentence. Israel granted him citizenship in 1996, and he remains a cause celebre in Israel.

On June 13, 2005, U.S. Department of Defense analyst Lawrence Franklin was indicted for the unauthorized disclosure of classified information (about Iran) to a foreign diplomat. Press reports named Na'or Gil'on, a political counselor at the Israeli Embassy in Washington, as the diplomat. Gil'on has not been accused of wrongdoing and returned to Israel. Then Foreign Minister Shalom strongly denied that Israel was involved in any activity that could harm the United States, and Israel's Ambassador to the United States Daniel Ayalon declared that "Israel does not spy on the United States." Franklin had been charged earlier on related counts of conspiracy to communicate and disclose national defense information to "persons" not entitled to receive it. On August 4, 2005, two former officials of the American Israel Political Action Committee (AIPAC), Steven J. Rosen and Keith Weissman, whom AIPAC fired in April 2005, were identified as "persons" and indicted for their parts in the conspiracy. Both denied wrongdoing. On October 24, their attorneys asked the court to summon Israeli diplomats to Washington for testimony. On January 20, 2006, Franklin was sentenced to 12 years, 7 months in prison. Rosen and Weissman are the first nongovernment employees ever to be indicted under the 1917 Espionage Act for receiving classified information orally and argue that they were exercising protected free speech.[(19)]

U.S. Israeli Relations. Commitment to Israel's security and well being has been a cornerstone of U.S. policy in the Middle East since Israel's creation in 1948, in which the United States played a key supporting role. Israel and the United States are bound closely by historic and cultural ties as well as by mutual interests. Continuing U.S. economic and security assistance to Israel acknowledges these ties and signals U.S. commitment. The broad issues of Arab-Israeli peace have been a major focus in the U.S. -Israeli relationship. U.S. efforts to reach a Middle East peace settlement are based on UN Security Counsel Resolutions 242 and 338 and have been based on the premise that as Israel takes calculated risks for peace the United States will help minimize those risks.[(20)]

National Economic Intelligence Collection Efforts. Israel has an active program to gather proprietary information within the United States. These collection activities are primarily directed at obtaining information on military systems, and advanced computing applications that can be used in Israel's sizable armaments industry. Two primary activities have conducted espionage activities within the United States: the Central Institute for Intelligence and Special Activities (MOSSAD) and the Scientific Affairs Liaison Bureau of the Defense Ministry (LAKAM). The Israelis use classic HUMINT techniques, SIGINT, and computer intrusion to gain economic and proprietary information.[(21)]

As the above rather lengthy recitation of information garnered from a variety of documents[(22)] clearly indicates, a number of security concerns persist in relation to Israel despite its democratic form of government and obvious close

ties to the United States. Included, are the espionage and technology transfer cases that were conducted for the benefit of Israel, whether or not they were done with government knowledge and/or participation, the terrorist activity within Israel, and Israeli military sales are not consistent with U.S. interests.

Applicant's six siblings-in-law are citizens and residents of Israel. Applicant has traveled to Israel four times in the past 25 years and her husband travels to Israel on a more frequent basis. Accordingly, there exists at least a potential risk and danger that attempted coercion, exploitation, or pressure could be exerted on Applicant through his foreign relatives or to Applicant himself when she and/or her husband is visiting Israel.

"Whole Person" Analysis

In addition to the enumerated disqualifying and mitigating conditions as discussed previously, I have considered the general adjudicative guidelines related to the whole person concept under Directive ¶ E2.2.1. The Appeal Board has repeatedly held that a Judge may find in favor of an applicant where no specific mitigating conditions apply.[(23)] Moreover, "[u]nder the whole person concept, the administrative judge must not consider and weigh incidents in an applicant's life separately, in a piecemeal manner. Rather, the Judge must evaluate an applicant's security eligibility by considering the totality of an applicant's conduct and circumstances."[(24)] The directive lists nine adjudicative process factors (APF) which are used for "whole person" analysis. Because foreign influence does not involve misconduct, voluntariness of participation, rehabilitation and behavior changes, etc., the eighth APF, "the potential for pressure, coercion, exploitation, or duress," Directive ¶ E2.2.1.8, is the most relevant of the nine APFs to this adjudication.[(25)] In addition to the eighth APF, other "[a]vailable, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination." Directive ¶ E2.2.1. Ultimately, the clearance decision is "an overall common sense determination." Directive ¶ E2.2.3.

The Appeal Board requires the whole person analysis address "evidence of an applicant's personal loyalties; the nature and extent of an applicant's family's ties to the U.S. relative to his [or her] ties to a foreign country; his or her ties social ties within the U.S.; and many others raised by the facts of a given case." ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007). In that same decision, the Appeal Board commended the whole person analysis in ISCR Case No. 03-02878 at 3 (App. Bd. June 7, 2006), which provides:

Applicant has been in the U.S for twenty years and a naturalized citizen for seven. Her husband is also a naturalized citizen, and her children are U.S. citizens by birth. Her ties to these family members are stronger than her ties to family members in Taiwan. She has significant financial interests in the U.S. , and none in Taiwan. She testified credibly that she takes her loyalty to the U.S. very seriously and would defend the interests of the U.S. Her supervisors and co-worker assess her as very loyal and trustworthy.

Several circumstances weigh against Applicant in the whole person analysis. First and more importantly, Israel has been actively involved in espionage against the United States. Second, Applicant has connections to Israel through her siblings-in-law. She also attended her senior year studying abroad in Israel where she met her husband and her first child was born. Third, one of her siblings-in-law is receiving a government pension from Israel. Fourth, she has occasional contact with her siblings-in-law, but more accurately such contact is maintained through her husband. There is no evidence in the record to suggest Applicant or her husband provide any support to any relatives in Israel.

There are many other countervailing, positive attributes to Applicant's life as a U.S. citizen that weigh towards granting her clearance. Her Israeli passport is expired. She has strong links or connections to the United States: (1) Applicant was born, raised, and educated in the U.S., (2) her three children are U.S. citizens, and all of them reside in the United States. Each child is hard working, productive, successful, and making positive contributions to society; (3) she has resided in the United States for her entire life except for several years in Israel as a young woman and has continuously remained in the U.S. since she returned from Israel 25 years ago; (4) her husband became a U.S. citizen less than five years after arriving in the U.S; (5) her husband holds a responsible position as a director of probation in a major metropolitan area and holds a Department of Homeland security clearance; (6) all her real and personal property are in the U.S. to include owning a home. All her financial connections are in the United States;[(26)] and (7) she credibly stated that she would never do anything to harm the U.S.

There is no reason to believe that she would take any action which could cause potential harm to her U.S. family or to this country. She is patriotic, loves the United States, and would not permit Israel to exploit her. She has close ties to the United States. Her closest family members are her three children. They are U.S citizens and live with her or near her. Because her children live in the United States, they are not vulnerable to coercion or exploitation by a foreign power. The realistic possibility of pressure, coercion, exploitation or duress is low. I base this conclusion on her credible and sincere testimony, and I do not believe she would compromise national security, or otherwise comply with any Israeli threats or coercion. Applicant has not been to Israel since 2005, and is unlikely to return to Israel.[(27)] Her supervisors, coworkers and friends describe her as very honest, loyal, and trustworthy. She is involved with her synagogue and is an asset to her community and company.

After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude Applicant has mitigated or overcome the security concerns pertaining to foreign influence and foreign preference. I have no doubts concerning Applicant's security eligibility and suitability. I take this position based on the law, as set forth in *Department of Navy v. Egan,* 484 U.S. 518 (1988), my "careful consideration of the whole person

factors"[(28)] and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under Enclosure 2 of the Directive. I conclude Applicant is eligible for access to classified information.

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: FOR APPLICANT

Subparagraph 1.a - 1.c.: For Applicant

Paragraph 2, Guideline B: FOR APPLICANT

Subparagraph 2.a. - 2.b.: 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 or continue a security clearance for Applicant. Clearance is granted.

Robert J. Tuider

Administrative Judge

1. GE 1 (Electronic Standard Form (SF) 86, Security Clearance Application is dated December 23, 2004, on the first page and dated December 23, 2004, and subsequent signature release pages). There is no allegation of falsification of this SF 86 in the statement of reasons (SOR).

2. SOR, dated June 28, 2006 is the source for the facts in the remainder of this paragraph.

3. Applicant's response to SOR was received at DOHA July 27, 2006.

4. Ex. 1, *supra* n. 1, section 1.1, at 1.

5. "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing

two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v.Washington Metro. Area Transit Auth*., 36 F.3d 375, 380 (4th Cir. 1994).

6. "The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, [evaluates] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and [decides] whether Applicant [has] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

7. Directive, Additional Procedural Guidance, Item E3.1.14.

8. Directive, Additional Procedural Guidance, Item E3.1.15.

9. ISCR Case No. 99-0597 (December 13, 2000).

10. *Compare* ISCR Case No. 03-10954 (App. Bd. Mar. 8, 2006); *with* ISCR Case No. 03-10312 at 6-9 (A.J. May 31, 2006); ISCR Case No. 02-21927, 2006 DOHA Lexis 229, at *15-*45 (A.J. May 17, 2006) (discussing the parameters and application of FI MC 1, especially the scope and definition of "agent of a foreign power"). 50 U.S.C. § 1801(b) defines "agent of a foreign power." The statutory definition for "agent of a foreign power" was explicitly included in Executive Order 12968, Aug. 2, 1995, Part 1.1f, which established, "a uniform Federal personnel security program for employees who will be considered for initial or continued access to classified information." The Appeal Board's decision in ISCR Case No. 04-00540 at 6 (App. Bd. Jan. 7, 2007) reiterating the broad definition of "agent of a foreign power" does not address why Executive Order 12968 is not controlling. *See* ISCR Case No. 04-03720 at 4 (App. Bd. June 14, 2006); ISCR Case No. 04-02233 at 3 (App. Bd. May 9, 2006), *see generally Nickelson v. United States*, 284 F.Supp.2d 387, 391 (E.D. Va. 2003) (requiring agency to follow own rules in security clearance determinations); ISCR Case No. 04-12648 at 10-13 (App. Bd. Oct. 20, 2006) (Harvey, J., dissenting) (explaining limitations on Appeal Board's authority to reverse).

11. *See* ISCR Case No. 03-17071 at 3 (App. Bd. Nov. 22, 2006), *see also* ISCR Case No. 02-2454 at 4-5 (App. Bd. June 29, 2004) (employee of a city government was an "agent of a foreign power").

12. ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005) (quoting ISCR Case No. 00-0317 at 6 (App. Bd. Mar. 29, 2002)).

13. The Appeal Board has not increased an applicant's burden of persuasion in cases involving contacts with family members living in Israel. This situation may be compared to the Appeal Board's decision to place a "very heavy burden of persuasion" on applicants to demonstrate that contacts with immediate family members living in Iran do not pose a security risk. *See* ISCR Case No. 02-13595 at 3 (App. Bd. May 10, 2005) (stating an applicant has "a very heavy burden of persuasion to overcome the security concerns" when parents and siblings live in Iran); ISCR Case No. 04-11463 at 4 (App. Bd. Aug. 4, 2006) (articulating "very heavy burden" standard when applicant's family members live in Iran).

14. Another less significant reason not to apply FI MC 1 is the history of terrorist activity in Israel. The Appeal Board has limited the applicability of FI MC 1 where there is a history of terrorist activity in the foreign country in question. ISCR Case No. 03-22643 (App. Bd. Jun. 24, 2005); ISCR Case No. 02-22461 at 5 (App. Bd. Oct. 22, 2005).

15. Directive, Additional Procedural Guidance, Item E3.1.14.

16. Directive, Additional Procedural Guidance, Item E3.1.15.

17. ISCR Case No. 99-0597 (December 13, 2000).

18. *Israel: Background and Relations with the United States*, CRS Issue Brief for Congress, June 14, 2006. (Ex. V).

19. *Id.*

20. U.S. State Department, *Background Note: Israel,* May 2006. (Ex. I).

21. Interagency OPSEC Support Staff (IOSS), *Intelligence Threat Handbook* (2004), October 6, 2006. (Ex. VI).

22. *See* Exs. I through IX. They represent a much more comprehensive discussion and analysis on this topic.

23. ISCR Case No. 02-30864 at 4 (App. Bd. Oct. 26, 2005); ISCR Case No. 03-11448 at 3-4 (App. Bd. Aug. 10, 2004); ISCR Case No. 02-09389 at 4 (App. Bd. Dec. 29, 2004); ISCR Case No. 02-32006 at 5 (App. Bd. Oct. 28, 2004).

24. ISCR Case No. 03-04147 at 3 (App. Bd. Nov. 4, 2005) (quoting ISCR Case No. 02-01093 at 4 (App. Bd. Dec. 11, 2003)).

25. *See* ISCR Case No. 02-24566 at 3 (App. Bd. July 17, 2006) (stating that an analysis under the eighth APF apparently without discussion of the other APFs was sustainable); ISCR Case No. 03-10954 at 5 (App. Bd. Mar. 8, 2006) (sole APF mentioned is eighth APF); ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006) (remanding grant of clearance because Judge did not assess "the realistic potential for exploitation"), *but see* ISCR Case No. 04-00540 at 6 (App. Bd. Jan. 5, 2007) (rejecting contention that eighth APF is exclusive circumstance in whole person analysis in foreign influence cases).

26. Department Counsel did not allege financial interests as a FI DC and as stated earlier, no FI MCs apply. However, I observe Applicant has no financial interests in Israel. *See* ISCR Case No. 04-02233 at 3 (App. Bd. May 9, 2006) (stating lack of foreign financial interests do not mitigate Guideline B security concerns based on an applicant's relationship with relatives); ISCR Case No. 03-04300 (App. Bd. Feb. 16, 2006), 2006 DOHA Lexis 264 at *17 (accepting the Judge's conclusion applying FI MC 5 because that applicant's foreign financial interests were minimal and not sufficient to affect her security responsibilities).

27. I observe that there is no record evidence establishing: (1) any connection or contact between Applicant and any foreign government; (2) any financial interests between Applicant and any foreign nation, or any foreign business concern; (3) her failure to follow the rules or her failure to require those around him to do the same on projects requiring security clearances; (4) any lack of the respect and trust of her employer, her friends, or family; (5) a problem for Applicant in the areas of honesty or integrity; (6) her siblings-in-law are or have been, political activists or journalists, challenging the policies of the Israeli government, or that they otherwise engage in activities which would bring attention to themselves; (7) the Israeli government has approached any of her siblings-in-law living in Israel for any reason; (8) that Israeli officials are even aware of her work for a government contractor. As such, there is a reduced possibility that they would be targets for coercion or exploitation by the Israeli government, which occasionally seeks to quiet those which speak out against it. I conclude, however, that the government has no burden to present such evidence, and the absence of evidence does not support application of any mitigating condition, or approval of a clearance. *See* ISCR Case No. 02-21927, 2006 DOHA Lexis 229, at *39-*41 (A.J. May 17, 2006) (discussing absence of evidence and relationship to burden shifting). Although Applicant previously had an interim clearance, there is no reason for Israel to contact or threaten her until she receives access to classified information. *See* ISCR Case No. 02-22461 at 10 (App. Bd. Oct. 27, 2005),

28. *See* ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).