DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 07-03998
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric H. Borgstrom, Esquire, Department Counsel
For Applicant: *Pro se*

February 27, 2008

_____

Decision

_____

FOREMAN, LeRoy F., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86) on October 5, 2006. On August 9, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines B (Foreign Influence) and C (Foreign Preference). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on September 6, 2007; answered it on the same day; and requested a hearing before an administrative judge. DOHA received the request on September 10, 2007. Department Counsel was ready to proceed on December 7, 2007. The case was assigned to me on December 12, 2007, and DOHA issued a notice of hearing on January 8, 2008. I convened the hearing as scheduled on January 29, 2008. Government Exhibits (GX) 1 through 4 were admitted

in evidence without objection. Applicant testified on his own behalf, and submitted Applicant's Exhibit (AX) A, which was admitted without objection. I granted Applicant's request to keep the record open until February 15, to enable him to submit additional evidence. He did not submit any additional evidence. DOHA received the transcript of the hearing (Tr.) on February 7, 2008. The record closed on February 15, 2008. On February 21, 2008, Applicant notified me by email that he had nothing further to submit (AX B). Eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Unauthenticated Report of Investigation

Department Counsel offered GX 3, a personal subject interview extracted from a report of investigation, without calling an authenticating witness as required by the Directive ¶ E3.1.20. I explained the authentication requirement to Applicant, and he affirmatively waived it (Tr. 30). Based on his waiver, I admitted GX 3.

Request to take Administrative Notice

Department Counsel requested that I take administrative notice of relevant facts about Israel. The request and all but one of the documents attached as enclosures were not admitted in evidence but are attached to the record as Hearing Exhibit (HX) I. I declined to take administrative notice based on a Congressional Research Service report on Israel (Enclosure VI to HX I), because there was no evidence the analysis and opinions of the author were accepted by the U.S. government as not subject to reasonable dispute (Tr. 22). I admitted the Enclosure VI, without objection from Applicant, as GX 4 (Tr. 28).

Findings of Fact

In his answer to the SOR, Applicant admitted all the factual allegations in the SOR. His admissions in his answer to the SOR and at the hearing are incorporated in my findings of fact. I make the following findings:

Applicant is a 53-year-old electrical engineer. He has been employed as a consultant by a defense contractor since September 2006. He is regarded by his employer as a valuable employee whose ability to contribute to Department of Defense projects would be "greatly enhanced" if he had a security clearance (AX A).

Applicant was born in Israel, and served in the Israeli Air Force from May 1974 to August 1981, attaining the highest enlisted grade, equivalent to a sergeant major in the U.S. Army (Tr. 38-39). He held an Israeli security clearance during his military service (Tr. 39). He came to the U.S. in August 1981, after leaving the Israeli Air Force to complete his college education. He obtained a bachelor's degree and master's degree in electrical engineering from a U.S. university in May 1985. He became a U.S. citizen in October 1989.

In September 1974, while in military service, Applicant was married to an Israeli citizen. His wife became a U.S. citizen in September 2000 and resides with him in the U.S. She is a dual U.S.-Israeli citizen. His wife was a high school teacher in Israel, and she is now a university professor of literature in the U.S. (Tr. 40, 43). They have three children who are dual citizens and reside in the U.S. The oldest was born in Israel and the other two were born in the U.S. (Tr. 42, 45).

Applicant's parents are deceased and he has no siblings. He inherited an apartment in Israel from his parents. The apartment is managed by his father-in-law, is worth about $120,000, and generates monthly rental income of about $500 (GX 2 at 20; Tr. 53-54). At the hearing, Applicant denied that he kept his Israeli citizenship to protect his property, and Department Counsel conceded the point (Tr. 73). All of his other assets are in the U.S., except for about $9,000 in a bank account in Israel, used to manage the apartment (Tr. 58-59). He estimates his net worth at about 2 million dollars (Tr. 61).

Applicant's mother-in-law, father-in-law, and brother-in-law are citizens and residents of Israel. His father-in-law is the only relative connected to the Israeli government (GX 2 at 5). He was employed as a publications manager for the Israeli Ministry of Defense from about 1965 to 1995 (GX 2 at 4). His mother-in-law was a bank clerk until she retired about 10 years ago (Tr. 51). His in-laws visited him and his wife in the U.S. about a year ago and stayed for two weeks (Tr. 51-52). Applicant and his wife visited his in-laws in Israel about two weeks before the hearing (Tr. 52). Applicant and his wife talk to his father-in-law and mother-in-law once or twice a week, with the calls usually initiated by his wife (Tr. 57).

Applicant retained his Israeli passport after becoming a U.S. citizen, and he used it to travel to Israel in March 1998, July 1998, December 1999, March 2004, January 2005, January 2006, and November 2007. He used his U.S. passport for all other foreign travel (GX 3 at 1; Tr. 35).

In January 2007, Applicant told a security investigator he was willing to renounce his Israeli citizenship and surrender his passport if it was a condition for obtaining a clearance (GX 3 at 2). In response to DOHA interrogatories executed in May 2007, Applicant stated he was willing to destroy, surrender, or invalidate his Israeli passport if it was necessary to obtain a clearance (GX 2 at 15). At the hearing, Applicant testified he talked with an official at the Israeli Consulate about the possibility of "keeping the passport there," and obtaining substitute travel documents from the consulate when he travels to Israel (Tr. 54, 56). He also testified he would be willing to surrender his passport to his facility security officer and obtain a letter stating that the passport had been surrendered (Tr. 55). Finally, he testified he did not intend to renew his Israeli passport (Tr. 64).The passport's expiration date was February 8, 2008.

Applicant testified he would be willing to renounce his Israeli citizenship (Tr. 56). He had discussed the procedure for renouncing his citizenship with the Israeli

Consulate but had not taken any action to do so (Tr. 66). When the record closed on February 15, 2008, Applicant had not provided any documentation regarding his Israeli citizenship or the disposition of his passport.

I take administrative notice of the following facts about Israel. Israel is a parliamentary democracy with a diversified, technologically advanced economy. Almost half of Israel's exports are high technology, including electronic and biomedical equipment. The U.S. is Israel's largest trading partner. Israel has been identified as a major practitioner of industrial espionage against U.S. companies. Israel generally respects the rights of its citizens. When human rights violations have occurred, they have involved Palestinian detainees or Arab-Israelis. Terrorist suicide bombings are a continuing threat in Israel, and U.S. citizens are advised to be cautious. The U.S. and Israel have close cultural, historic, and political ties. They participate in joint military planning and training, and have collaborated on military research and weapons development. Commitment to Israel's security has been a cornerstone of U.S. Middle East policy since Israel's creation in 1948.

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the 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.

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "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). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Guideline B (Foreign Influence)

The SOR alleges Applicant's mother-in-law, father-in-law, and brother-in-law are citizens and residents of Israel, and his father-in-law was employed by the Israeli Ministry of Defense from about 1965 to 1995 (SOR ¶¶ 1.a, 1.b, 1.c). It also alleges Applicant's wife and three children are dual U.S.-Israeli citizens residing in the U.S. (¶¶ 1.d, 1.e). Finally, it alleges Applicant owns property worth $120,000 in Israel and earns rental income from the property (¶ 1.f). The security concern relating to Guideline B is set out in AG ¶ 6 as follows:

> Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United

States citizens to obtain protected information and/or is associated with a risk of terrorism.

A disqualifying condition may be raised by "contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion." AG ¶ 7(a). A disqualifying condition also may be raised by "connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information." AG ¶ 7(b). Finally, a security concern may be raised if an applicant is "sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion" AG ¶ 7(d). Applicant's wife and three children are dual citizens, and his wife has three immediate family members who are citizens and residents of Israel. Based on this evidence, AG ¶¶ 7(a), (b), and (d) are raised.

A security concern also may be raised by "a substantial business, financial, or property interest in a foreign country . . . which could subject the individual to heightened risk of foreign influence or exploitation." AG ¶ 7(e). The value of the apartment building, $120,000, is a relatively small part of Applicant's total assets. Nevertheless, its value is sufficiently "substantial" to raise AG ¶ 7(e).

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 7(a), (b), (d), and (e), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns under this guideline can be mitigated by showing that "the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S." AG ¶ 8(a). The totality of an applicant's family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003).

"[T]here is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse." ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at * 8 (App. Bd. Feb. 20, 2002). The presumption has not been rebutted in this case.

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

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

All members of Applicant's immediate family are citizens and residents of the U.S. His brother-in-law's specific occupation is not reflected in the record, but none of his in-laws are currently connected to the Israeli government or armed forces. His mother-in-law and father-in-law were not involved in high technology industries likely to be involved in industrial espionage. While his father-in-law and mother-in-law are dependent on the Israeli government for their pensions and medical care, the Israeli government does not have a record of abusing its own citizens as a means of conducting industrial or military espionage. I conclude the mitigating condition in AG ¶ 8(a) is established.

Security concerns under this guideline also can be mitigated by showing "there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest." AG ¶ 8(b). Applicant's testimony at the hearing tended to show his willingness to sever his ties to Israel. As such, his testimony tended to support this mitigating condition. However, his failure to provide documentation of his stated intentions to surrender his Israeli passport and renounce his Israeli citizenship undermines his testimony at the hearing. I conclude AG ¶ 8(b) is not established.

Security concerns arising from ownership of foreign property can be mitigated by showing that "the value or routine nature of the . . . property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, pressure the individual." AG ¶ 8(f). Applicant's ownership of property in Israel is not dependent on being an Israeli citizen, and Israel does not have a record of using foreign-owned property as leverage for industrial espionage. Applicant appeared to have little personal attachment to the rental property, and he has considered

disposing of it, perhaps by giving it to his children. The evidence regarding this mitigating condition is inconclusive, meaning that Applicant has not carried his burden of proof. AG ¶ 8(f) is not established.

Guideline C (Foreign Preference)

The SOR alleges Applicant currently possesses an Israeli passport that will expire on February 8, 2008 (¶ 2.a), he used his passport to travel to Israel on numerous occasions (¶ 2.b), he maintained his Israeli citizenship to protect his property in Israel (¶ 2.c), and he served in the Israeli Air Force from May 1974 to August 1981 (¶ 2.d). The concern under this guideline is set out in AG ¶ 9 as follows: "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."

Dual citizenship standing alone is not sufficient to warrant an adverse security clearance decision. ISCR Case No. 99-0454 at 5, 2000 WL 1805219 (App. Bd. Oct. 17, 2000). Under Guideline C, "the issue is not whether an applicant is a dual national, but rather whether an applicant shows a preference for a foreign country through actions." ISCR Case No. 98-0252 at 5 (App. Bd. Sep 15, 1999).

A disqualifying condition may arise from "exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen," including but not limited to "possession of a current foreign passport." AG ¶ 10(a)(1). At the time of the hearing, Applicant possessed a "current foreign passport," which he had used many times to visit Israel. The passport had an expiration date of February 8, 2008. Although Applicant promised to provide documentation that the passport had been surrendered to an Israeli diplomatic official or his facility security officer, he provided nothing. On this record, I cannot determine whether Applicant surrendered, destroyed, obtained an extension of its expiration date, or renewed it. I conclude AG ¶ 10(a)(1) is not established because there is no evidence Applicant has a "current foreign passport."

Nevertheless, the record also established he exercised his Israeli citizenship on numerous occasions by using his Israeli passport. Thus, the general disqualifying condition under AG ¶ 10(a) is raised, even though none of the illustrative examples in AG ¶ 10(a)(1)-(7) are applicable.

Department Counsel conceded that Applicant did not maintain his Israeli citizenship to protect his property interests. Thus, I resolve SOR ¶ 2.c in his favor.

Applicant's military service in the Israeli Air Force does not raise a disqualifying condition because it occurred before he became a U.S. citizen. Thus, I resolve SOR ¶ 2.d in his favor.

Because the disqualifying condition under AG ¶ 10(a) is raised, the burden shifted to Applicant to rebut, explain, mitigate, or extenuate the facts. Several mitigating conditions are relevant.

Security concerns under this guideline may be mitigated by evidence that "dual citizenship is based solely on parents' citizenship or birth in a foreign country." AG ¶ 11(a). This mitigating condition is established.

Security concerns under this guideline also may be mitigated by if "the individual has expressed a willingness to renounce dual citizenship." AG ¶ 11(b). Applicant has stated numerous times, including at the hearing, that he is willing to renounce dual citizenship, if it is a condition for obtaining a clearance. He has discussed the procedure for renouncing his Israeli citizenship with appropriate Israeli official, but he failed to produce evidence that he acted on his stated intention.

In response to my questions, Applicant repeated his willingness to surrender his Israeli passport and renounce his Israeli citizenship if it was necessary to obtain a clearance. Applicant appeared to believe he could agree to surrender his passport and renounce his Israeli citizenship and obtain a clearance contingent upon carrying out those promises. I explained that possession of an Israeli passport was "a major obstacle to overcome," and he needed to decide what to do. I kept the record open, explaining, "[T]his will give you time to consult with people if you want to talk with family, decide what you want to do, and if you decide to take any actions to provide documentation to me and to Department Counsel." I emphasized, "I'm not going to tell you what my decision is, but I'm telling you that [the passport is] a major consideration, which is why we're here." (Tr. 70-71.) At the conclusion of the hearing, I reminded Applicant, "I'll leave it up to you what documentation you want to present, but we've left open some unanswered questions, and in part you need to decide what you want to do, and then you need to document it." (Tr. 80.)

Applicant apparently wanted to be assured he would receive a clearance before surrendering his passport or renouncing his citizenship. An administrative judge does not have authority to grant a conditional clearance. ISCR Case No. 99-0901, 2000 WL 288429 at *3 (App. Bd. Mar. 1, 2000). A conditional willingness to renounce dual citizenship is insufficient to establish AG ¶ 11(b).

Security concerns based on possession or use of a foreign passport may be mitigated if "the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated." AG ¶ 11(e). Applicant has produced no evidence regarding disposition of his passport. An expired passport is "otherwise invalidated." However, on this record, I cannot determine whether he surrendered it, destroyed it, renewed it, or kept it with the intention of renewing it when he needs it. I conclude AG ¶ 11(e) is not established.

Whole Person Concept

Under the whole person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

> (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) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept. Some of the factors in AG ¶ 2(a) were addressed above, but some warrant additional comment.

Applicant is a mature, well-educated, very intelligent adult. However, he appeared to have difficulty understanding he could not be promised he would receive a clearance before disposing of his Israeli passport. He said the right words about surrendering his passport and renouncing his citizenship, but he failed to provide documentation that he carried out his stated intentions.

After weighing the disqualifying and mitigating conditions under Guidelines B and C, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on foreign influence, but he has not mitigated the security concerns based on foreign preference. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25 of Enclosure 3:

Paragraph 1, Foreign Influence:	FOR APPLICANT
Subparagraphs 1.a-1.f:	For Applicant

Paragraph 2, Foreign Preference:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	For Applicant
Subparagraph 2.d:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

_____
LeRoy F. Foreman
Administrative Judge