



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 07-04575

Appearances

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

March 28, 2008

Decision

WHITE, David M., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on February 3, 2005. On November 1, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline C for Applicant.¹ 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 answered the SOR in writing on November 20, 2007, and requested that his case be decided by an Administrative Judge on the written record without a

¹Item 1.

hearing.² Department Counsel submitted the Government's written case on December 31, 2007. A complete copy of the file of relevant material (FORM)³ was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant signed the document acknowledging receipt of his copy of the FORM on January 15, 2008, and returned it to DOHA. After seeking and receiving additional time to respond from DOHA, Applicant responded to the FORM in a letter, dated February 15, 2008, that he sent via Express Mail on February 19, 2008, and DOHA received on February 21, 2008. In the letter, he disputed several factual inaccuracies in the FORM and some of Department Counsel's analysis, but made no objection to consideration of any evidence submitted by the Government. Department Counsel did not object to consideration of anything submitted by Applicant. He submitted a two-page "Department Counsel's Reply to Applicant's Response to the File of Relevant Materials," dated March 7, 2008, in which he briefly responded in attempt to counter five of the fifteen points in Applicant's response. This "Reply" contains legal arguments that are incorrect, and cites at least one case relying on superseded regulatory authority. To the extent it contains new information that Department Counsel wants to have considered, that material was not forwarded to Applicant for his objection or rebuttal as required in Directive ¶ E3.1.7. Accordingly, except for the fact that Department Counsel offered no legal objection to consideration of Applicant's response to the FORM, this "Reply" will be completely disregarded and forms no basis for any findings or conclusions below. I received the case assignment on March 13, 2008. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Findings of Fact

Applicant is a 64-year-old contracts manager for a defense contractor, where he has worked since June 1983. His mother and father were born in Germany in 1912 and 1903, respectively. He was born in Israel in October 1943. He moved with his parents, younger brother and sister, to the United States and they all became naturalized U.S. citizens. Applicant's naturalization certificate was issued February 19, 1962.

Applicant obtained a bachelor's degree in 1967 and a master's degree in 1976. He was commissioned a Second Lieutenant in the U.S. Air Force Reserve in June 1967. The record does not indicate how much time he spent on active duty, if any, but he retired from the Air Force in 1988 as a Major. He stated that he did not travel to Israel during his Air Force career because he did not want to face Israeli military service obligation issues.⁴ The record is also unclear, but evidence indicates that he has held a security clearance almost the entire period since 1967, without incident.

²Item 2.

³The government submitted five items in support of the allegations.

⁴Item 4 at 3.

In his answer to the SOR, dated November 20, 2007, and his sworn answers to DOHA interrogatories, dated June 19, 2007, and August 14, 2007, Applicant admitted the truth of all factual allegations in ¶¶ 1.a through 1.c of the SOR, with explanations. His admissions are incorporated herein as findings of fact.

Applicant applied for an Israeli passport, which was issued to him on June 5, 1998. Having never renounced his Israeli citizenship, and with no intention to do so, he believes Israeli law requires him to use an Israeli passport when entering or leaving Israel. He traveled to Israel for about ten days in July and August, 2005, and presented both his Israeli and his U.S. passports to Israeli border authorities. His passport was originally due to expire in June 1999. Applicant obtained three extensions, until June 2000, May 2007, and June 2008. The passport is valid, and Applicant intends to maintain a valid Israeli passport in the future for use in visiting Israel, particularly since his children may move there.⁵

Applicant answered two sets of DOHA Interrogatories on June 19, 2007, and August 14, 2007.⁶ In the first response, he stated that he did not intend to surrender or destroy his Israeli passport. The second Interrogatory forwarded him a copy of the "Money Memo," dated August 16, 2000, regarding the possession or use of a foreign passport, and asked him again whether he intended to destroy, surrender, or invalidate his Israeli passport. He again responded, "No." In his August 30, 2006 memorandum implementing the revised adjudicative guidelines within DoD, the Under Secretary of Defense (Intelligence) explicitly stated that the revised guidelines supersede the "Money Memo" concerning application of the Foreign Preference guideline.

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used to evaluate an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process paragraph of the AG. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2, the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

⁵Item 4 at 2, 3, 7, 8, 10.

⁶Items 4 and 5.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of the 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Section 7 of Executive Order 10865 provides that “Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

A person who applies for access to classified information seeks to enter into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. 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.

Analysis

Guideline C, Foreign Preference

Under AG ¶ 9 security concerns involving foreign preference arise because, “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.”

AG ¶ 10 describes conditions that could raise a security concern and may be disqualifying:

(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to:

(1) possession of a current foreign passport;

(2) military service or a willingness to bear arms for a foreign country;

(3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country;

(4) residence in a foreign country to meet citizenship requirements;

(5) using foreign citizenship to protect financial. or business interests in another country;

(6) seeking or holding political office in a foreign country; and,

(7) voting in a foreign election;

(b) action to acquire or obtain recognition of a foreign citizenship by an American citizen;

(c) performing or attempting to perform duties, or otherwise acting, so as to serve the interests of a foreign person, group, organization, or government in conflict with the national security interest; and,

(d) any statement or action that shows allegiance to a country other than the United States: for example, declaration of intent to renounce United States citizenship; renunciation of United States citizenship.

Applicant's actions in obtaining and maintaining his currently valid Israeli passport raise security concerns under ¶¶ 10(a)(1) and 10(b) above. He was born an Israeli citizen, but became a U.S. citizen in 1962. Obtaining an Israeli passport in 1998 was an action to obtain recognition of his continuing Israeli citizenship by the Israeli government after he was too old to face compulsory military service there. He intends to continue possession and use of a current Israeli passport.

AG ¶ 11 provides conditions that could mitigate those security concerns:

(a) dual citizenship is based solely on parents' citizenship or birth in a foreign country;

(b) the individual has expressed a willingness to renounce dual citizenship;

(c) exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor;

(d) use of a foreign passport is approved by the cognizant security authority.

(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated; and,

(f) the vote in a foreign election was encouraged by the United States Government.

Applicant's Israeli citizenship is based on his birth there. However, he came to the United States at an early age and has been a U.S. citizen since 1962. He did not return to Israel until 2005, but obtained a passport recognizing his continuing Israeli citizenship in 1998. This resumed assertion of Israeli citizenship forms the basis of the security concern under this guideline, and is not mitigated by the fact that the basis of that citizenship was birth location. Accordingly, ¶ 11(a) provides minimal, if any, grounds for mitigation in this case. Applicant is expressly unwilling to renounce dual citizenship, precluding any mitigation under ¶ 11(b). Applicant exercised the rights and privileges of an Israeli citizen by obtaining a passport when he was 54 years old, and 36 years after he became a U.S. citizen, so ¶ 11(c) provides no mitigation.

Applicant provided no evidence of approval by a cognizant security authority for his use of his Israeli passport, and has refused to destroy, surrender, or otherwise invalidate it. Accordingly, ¶¶ 11(e) and 11(f) were not established. Since the allegations do not include voting in Israeli elections, ¶ 11(f) is not pertinent.

Whole Person Concept

Under the whole person concept, the 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. The 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a mature, well-educated individual who is responsible for his choices and conduct. He held a security clearance throughout his years in the Air Force and afterwards, without incident. Thirty-six years after becoming a U.S. citizen, he sought and obtained an Israeli passport in recognition of his desire to be recognized as an Israeli citizen. However, he avoided any exercise of the rights and privileges of Israeli citizens until 1998 because he did not want to face

Israeli military service obligations. This is no longer a concern. Applicant's conduct is recent, ongoing, and entirely voluntary. After being advised of the security concerns raised by his conduct, Applicant indicated a continuing unwillingness to change it. His motivation is to effect recognition of his Israeli citizenship and spend more time there in the future. His exercise of Israeli citizenship, and acceptance of the obligations thereof, increases the potential for pressure or exploitation. Applicant's service as an officer in the U.S. Air Force was prior to his obtaining and maintaining the validity of a foreign passport in recognition of his foreign citizenship.⁷ While the "Money Memo" is no longer binding guidance, the concerns underlying it remain valid and Applicant offered insufficient evidence to mitigate these concerns.

Overall, the record evidence creates substantial doubt as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns raised by his obtaining, using and ongoing possession of a foreign passport in recognition of his foreign citizenship.

Formal Findings

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

Paragraph 1, Guideline C:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant

Conclusion

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

DAVID M. WHITE
Administrative Judge

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Applicant objected that Department Counsel's whole person analysis ignored his record of military service and the fact that his commission as a second lieutenant contains the boilerplate language expressing the President's "special trust and confidence in [his] patriotism, valor, fidelity and abilities." While such service is certainly relevant to evaluating Applicant's security worthiness, it is by no means determinative. The wording on a commissioning certificate is not evidence that the President had any personal knowledge of Applicant's qualities, and his fitness in 1967 is of limited probative value given his intervening conduct.