DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 07-05795
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

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

April 15, 2008

Decision

FOREMAN, LeRoy F., Administrative Judge:

Applicant submitted his security clearance application on April 3, 2006. On October 17, 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 answered the SOR on November 1, 2007 and requested a hearing before an administrative judge. DOHA received the request on November 13, 2007. Department Counsel was prepared to proceed on December 7, 2007, and the case was assigned to me on December 12, 2007. DOHA issued a notice of hearing on January 8, 2008, setting the case for January 30, 2008. Applicant requested a continuance on January 22, 2008, which I granted. His request for a continuance and my order granting

it are attached to the record as Hearing Exhibits (HX) I and II. DOHA issued a second notice of hearing on February 6, 2008, setting the case for February 26, 2008, and I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified on his own behalf and submitted Applicant's Exhibits (AX) A through P, which were admitted without objection. I granted Applicant's request to keep the record open until March 7, to enable him to submit additional evidence. On February 29, 2008, Applicant requested additional time to submit evidence, and I extended the deadline until March 14, 2008 (HX III). Applicant timely submitted AX Q, and it was admitted without objection. Department Counsel's response to AX Q is attached to the record as Hearing Exhibit IV. DOHA received the transcript of the hearing (Tr.) on March 5, 2008. The record closed on March 14, 2008. Eligibility for access to classified information is denied.

Evidentiary Ruling

Department Counsel requested that I take administrative notice of adjudicative facts about Lebanon and Syria. The request and its enclosures were not admitted in evidence but are attached to the record as HX Exhibit V. I granted Department Counsel's request, except for one paragraph based on Enclosure 9 to HX V, a report prepared by the Congressional Research Service. I declined to take administrative notice based on Enclosure 9 because there was no showing that the facts recited and conclusions reached had been accepted as not subject to reasonable dispute by any agency of the United States (Tr. 30-35). *See* Fed. R. Evid. 201. Enclosure 9 was redesignated as GX 5 and admitted without objection. The facts administratively noticed are set out below in my Findings of Fact.

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 the 46-year-old chief executive officer of a building material procurement and general contracting company seeking to do business with the State Department. He has never held a clearance.

Applicant was born in Lebanon. When he was 13 years old, he and his family moved to France. Applicant testified his father was an ambitious, self-made man, who saw that Lebanon had no future (Tr. 93). Applicant decided to attend college in the U.S. because his father had a high regard for U.S. education and had worked all his adult life with U.S. firms and organizations (Tr. 38). He came to the U.S. on a student visa, and obtained bachelor's and master's degrees from U.S. universities (Tr. 6, 38-39). He became a U.S. citizen in 1993.

Applicant's spouse also is a native of Lebanon. They were married in the U.S. in June 1992. She earned a degree in architecture in Lebanon, came to the U.S. around

1989, and became a U.S. citizen in February 2000. They have three children who are native-born U.S. citizens.

Applicant's spouse has four siblings. Two sisters reside in the U.S. and one in France. The record does not reflect their citizenship. Her brother is a citizen and resident of Lebanon and works for her father's construction company (Tr. 67-68). The company does mainly residential construction and has no ties to the Lebanese government (Tr. 68).

Applicant's mother was born in Syria and moved to Lebanon as a child. Both his mother and father are citizens of Lebanon, became U.S. citizens in October 1993, and reside in France. His mother has never been employed outside the home, and has no affiliations with foreign governments. His father was an industrialist, manufacturing architectural building materials. He is now retired. He has had no affiliations with foreign governments or foreign armed forces.

Applicant has regular telephone contact with his parents. His parents visit him in the U.S. once or twice a year and stay with him or his brother during their visits. His parents last visited Lebanon at least five years ago. They visited primarily to see friends, because they have very little family left in Lebanon (Tr. 69). They have no property or financial interests in Lebanon (Tr. 69).

Applicant's older brother was born in Lebanon, completed his education in the U.S., and became a U.S. citizen in November 1993. His younger brother was born in Lebanon and became a U.S. citizen in March 2002.

Applicant's father-in-law and mother-in-law are citizens and residents of Lebanon. They have been visiting the U.S. for extended periods for 20 years, and they received permanent resident status in the U.S. in April 2004 (AX J, K; Tr. 60). However, Applicant testified his in-laws have deep roots in Lebanon (Tr. 95). Applicant has regular telephonic contact with them, and he testified he has "high affection" for them (Tr. 90).

In 2007, Applicant's spouse and their three children visited her parents for a week in Lebanon in 2007. His spouse and the two older children used Lebanese passports (Tr. 70). The third child, a two-year-old, traveled on a U.S. passport (Tr. 71).

Applicant has visited Lebanon annually, usually during the summer to visit family with their children. He used a Lebanese passport, even after he became a U.S. citizen, because Lebanon is the country of his birth. He testified he gained nothing in convenience or financial cost by using his Lebanese passport (Tr. 79). He used his U.S. passport for all other travel. At the hearing, he expressed his willingness to surrender or destroy his Lebanese passport (Tr. 78-79). He destroyed it in the presence of an official of the Defense Security Service on March 11, 2008 (AX Q).

During a security interview in February 2007, Applicant told a security investigator he was willing to renounce his Lebanese citizenship (GX 3 at 3). He reiterated his willingness to renounce his Lebanese citizenship at the hearing (Tr. 60).

Applicant's company was formed in July 2003 to supply material to U.S. contractors in Afghanistan and Iraq. He and his older brother are the owners of the company (Tr. 84). His company has performed numerous contracts for the U.S. Army Corps of Engineers and the State Department (AX P), and it was named as the State Department "Small Business of the Year," based on its performance of one of those contracts (AX D, N, and O).

Applicant's company has been prequalified by the State Department to participate in new contracts for construction of classified facilities (AX L, M; Tr. 57). The State Department sponsored his application for a clearance (GX 4 at 3, 5). His application is supported by several senior State Department officials (AX B, F, H) as well as several business colleagues (AX A, E, G, I). State Department officials describe him as "honorable and completely reliable," with "impeccable business and professional standards," and a "stellar performer." One colleague describes him as a person of "impeccable integrity, brutal honesty, and sound judgment." All colleagues commented favorably on his honesty, integrity, and high professional standards.

Applicant and his spouse are active in their local church, local swim teams and soccer teams, and community services. He coached soccer for several years at a local recreation center (Tr. 40).

I take administrative notice of the following adjudicative facts about Lebanon and Syria. Lebanon is a parliamentary republic that has been in a state of war with Israel since 1973. Its foreign policy and internal policies are heavily influenced by Syria, who maintains intelligence agents in Lebanon and is a state sponsor of terrorism. The unstable political situation in Lebanon enables foreign terrorist organizations to operate within its borders. Hizballah is the most prominent terrorist group in Lebanon. The Lebanese government recognizes Hizballah as a legitimate resistance group and political party. Hizballah maintains offices in Beirut and elsewhere in Lebanon, has liaison officers to Lebanese security forces, and is represented by elected deputies in the Lebanese parliament. Hizballah is closely allied with Iran, supports a variety of violent anti-Western groups, and has been involved in numerous anti-U.S. terrorist attacks.

Lebanon has a poor human rights record. Lebanese security forces have engaged in arbitrary arrest, murder, torture, and other abuses. There is an atmosphere of government corruption and lack of transparency. Militias and non-Lebanese forces operating outside the area of Lebanese central government authority have used informer networks and monitored telephones to obtain information about their perceived adversaries.

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 have 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 parents are dual citizens of Lebanon and the U.S. residing in France (SOR ¶¶ 1.a and b), his spouse is a dual citizen of Lebanon and the U.S. residing in the U.S. (SOR ¶ 1.c), his spouse's parents are citizens and residents of Lebanon (SOR ¶ 1.d) and he traveled to Lebanon in 1999, 2001, 2002, 2003, and 2004 (SOR ¶ 1.e). The security concern under 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 under this guideline may be raised by "contact with a foreign family member . . . 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).

Where family ties are involved, 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).

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.

Applicant's parents are U.S. citizens and they do not reside in a hostile country. The SOR does not allege any security concerns arising from their connections with France, and Department Counsel presented no evidence raising such concerns.

Applicant's spouse is a citizen and resident of the U.S., but her parents, although permanent U.S. residents, also reside in Lebanon for much of the time and have deep roots there. Applicant has "high affection" for his in-laws and maintains regular contact with them. The presence of his in-laws in Lebanon and their vulnerability to abuse by Lebanese authorities as well as terrorists in Lebanon raises the "heightened risk" in AG ¶ 7(a) and the potential conflict of interest in AG ¶ 7(b).

Applicant's spouse resides in the U.S., where she is less vulnerable to terrorism. However, she visits her parents regularly in Lebanon, accompanied by family members. Based on Applicant's ties of affection and obligations to both his spouse and in-laws, there is a "heightened risk of foreign inducement, manipulation, pressure, or coercion" exercised indirectly on him through his family ties. Thus, I conclude AG ¶ 7(d) is raised.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 7(a), (b), and (d), 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). This condition is not established because Applicant's relationships with his in-laws are close, and they reside in a country with a poor human rights record where terrorism is rampant and a terrorist organization is part of the political structure.

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).

Under the old adjudicative guidelines, a disqualifying condition based on foreign family members could not be mitigated unless an applicant could establish that the family members were not "in a position to be exploited." Directive ¶ E2.A2.1.3.1. The Appeal Board consistently applied this mitigating condition narrowly, holding that an applicant should not be placed in a position where he or she is forced to make a choice between the interests of the family member and the interests of the U.S. *See* ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006); ISCR Case No. 03-24933 at 6 (App. Bd. Jul. 28, 2005); ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2005); ISCR Case No. 03-15205 at 3 (App. Bd. Jan. 21, 2005). Thus, an administrative judge was not permitted to apply a balancing test to assess the extent of the security risk. Under the new guidelines, however, the potentially conflicting loyalties may be weighed to determine if an applicant "can be expected to resolve any conflict of interest in favor of the U.S. interest."

Applicant's loyalty to his family and in-laws certainly is not "minimal." He is still connected to his Lebanese heritage, as demonstrated by his continued his of his Lebanese passport, but he has no love for the current government of Lebanon. He, his spouse, and children continue to visit family members living in Lebanon. The evidence is insufficient to establish that Applicant would be likely to resolve a conflict of interest in favor of the U.S. interests if his spouse, children, or in-laws were threatened by foreign agents, Lebanese security forces, or terrorist groups operating in Lebanon. Thus, I conclude Applicant has not met his burden of establishing this mitigating condition.

Guideline C, Foreign Preference

The SOR alleges that Applicant exercises dual citizenship with Lebanon and the U.S. (SOR ¶ 2.a), he has an active Lebanese passport that was renewed after he became a U.S. citizen (SOR ¶ 2.b), and he used his Lebanese passport to travel to Lebanon on several occasions (SOR ¶ 2.c). The exercise of Lebanese citizenship alleged in SOR ¶ 2.a is the conduct alleged in SOR ¶¶ 2.b and c. Thus, SOR ¶ 2.a is duplicated by ¶¶ 2.b. and c, which plead the evidence supporting ¶ 2.a. When the same conduct is alleged more than once in the SOR under the same guideline, the duplicative allegations should be resolved in Applicant's favor. *See* ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3 (same debt alleged twice). Accordingly, I resolve SOR ¶¶ 2.b and c in Applicant's favor.

The security concern under this guideline is 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." AG ¶ 9. 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). Applicant's repeated use of his Lebanese passport after becoming a U.S. citizen raises this disqualifying condition.

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 told a security investigator he was willing to renounce his Lebanese citizenship, and he repeated his willingness to renounce it at the hearing. This mitigating condition is established.

Finally, 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). The destruction of his passport on March 11, 2008, establishes this mitigating condition.

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 loyal citizen of the U.S., deeply devoted to his family and a valued member of the community. All his immediate family members are U.S. citizens. He has established an impeccable business reputation and a personal reputation for integrity, honesty, and loyalty. The presence of his in-laws in Lebanon and the political conditions in Lebanon are beyond his control. He has taken significant steps to mitigate the security concerns in the SOR. Nevertheless, the presence of his in-laws in Lebanon, his bonds of affection for those in-laws, and his repeated visits to Lebanon, accompanied by his spouse and children, present a vulnerability to pressure, coercion, exploitation, or duress that is not mitigated.

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 preference, but he has not mitigated the security concerns based on foreign influence. 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, Guideline B (Foreign Influence):	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Paragraph 2, Guideline C (Foreign Preference):	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	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.

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LeRoy F. Foreman
Administrative Judge