DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 08-01980
SSN:	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: Pro Se

July 29, 2009

Second Remand Decision

HOGAN, Erin C., Administrative Judge:

Applicant submitted a Questionnaire for Sensitive Positions (SF 86), on May 3, 2007. On November 14, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline B, Foreign Influence; Guideline C, Foreign Preference; and Guideline M, Use of Information Technology. 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.

On December 3, 2008, Applicant answered the SOR and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on January 14, 2009. The case was assigned to me on January 23, 2009. On February 6, 2009, a Notice of Hearing was issued scheduling the hearing for February 24, 2009. The hearing was held as scheduled. The Government offered Government Exhibits (Gov) 1 - 5, which were admitted without objection. The Government requested that administrative notice be taken of one document with 15 attachments. The document

was marked as Hearing Exhibit I (Hearing Ex I) without objection. Applicant testified and submitted five exhibits which were admitted as Applicant Exhibits (AE) A – E without objection. Applicant presented a typed copy of his opening and closing statements. (Hearing Exhibit II) Applicant testified and called five witnesses on his behalf. DOHA received the transcript (Tr) of the hearing on March 4, 2009. The record was held open until March 10, 2009, to allow Applicant to submit additional documents. No additional documents were submitted.

I issued a decision on March 24, 2009. I found that Applicant mitigated the security concerns raised under Guideline B, Foreign Influence, and Guideline M, Use of Information Technology. I found he did not mitigate the security concerns raised under Guideline C, Foreign Preference, and I concluded it was not clearly consistent with the national interest to continue Applicant's access to classified information.

On April 1, 2009, Applicant appealed my decision, providing evidence that was not provided before the close of the record. Department Counsel filed a response to Applicant's appeal stating that under the facts of the case an expedited remand would be the equitable resolution to put the pertinent evidence before the Administrative Judge. On April 16, 2009, the Appeal Board remanded the case for further processing based on the additional evidence submitted by Applicant in his appeal. The additional evidence provided was a two-page document which I marked as AE D based on the Appeal Board's direction to consider the document as additional evidence even though the record had closed. (Upon further review of the case file during this second remand, it should actually be marked as AE F. I remarked the post-decision exhibit as AE F.) After considering the additional document, I issued a remand decision on May 6, 2009, concluding that it was not clearly consistent with the national interest to continue Applicant's access to classified information.

On June 29, 2009, the Appeal Board remanded the case to me because Applicant had offered a total of four pages in conjunction with his first appeal. The file only contained two pages. I considered the additional two pages as directed by the Appeal Board and marked them as AE G. I conclude based on a review of the case file, pleadings, testimony, and exhibits, including AE F and AE G as directed by the Appeal Board, that eligibility for access to classified information is denied.

Findings of Fact

The security concerns raised under Guideline B, Foreign Influence, and Guideline M, Use of Information Technology Systems are not addressed in this remand decision because the concerns were mitigated in my previous decision, dated March 24, 2009.

Applicant is a 57-year-old senior mechanical engineer employed with a Department of Defense contractor. He has worked for his current employer from 1985 to 1992, and from 1996 to present. He has a Bachelor of Science degree in mechanical

engineering. He is married and has four daughters, ages 29, 27 and 12 year-old twins. He has held a SECRET clearance since 1985. (Tr at 7, 74-77; Gov 1)

Applicant was born and raised in Israel. He moved to the United States in February 1976. He completed his college education at a U.S. university. He attended the first two years of college in Israel. He met his wife on a previous trip to the United States. After a long distance courtship, they became engaged and he moved to the United States on a fiancé visa. Applicant became a United States citizen on June 27, 1980. (Tr at 48-49; Gov 1; Gov 2)

Applicant's wife moved with her family to the United States when she was four years old. She became a U.S. citizen in 1968 and has continuously lived in the U.S. She has no relatives living in Israel. All of their daughters were born and live in the U.S. (Tr at 74-77) His wife is a dual citizen of Israel and the U.S. by virtue of her birth in Israel. His children are considered dual citizens of Israel and the U.S. by virtue of their parents' Israeli citizenship. Prior to traveling to Israel to visit family in June 2007, the entire family applied for Israeli passports. The Israeli Consulate did not issue his wife a passport. Applicant is not sure why but thinks it was because she lived in the U.S. for such a lengthy period of time and never applied for an Israeli passport. Applicant and his children were each issued Israeli passports. They used the passports only to travel to Israel. His wife traveled to Israel on her U.S. passport and had to go through the line for non-Israeli citizens when entering Israel. (Tr at 17, 45-46, 56)

Applicant is a dual citizen of the U.S. and Israel. He possesses a valid Israeli passport. It was issued on March 12, 2007, and does not expire until March 11, 2017. He held a previous Israeli passport which was issued on June 19, 1996, and expired on June 18, 2001. He renewed his Israeli passport because he believes it was the only way he could travel to Israel. (Tr at 52-53, 72) Applicant has a valid U.S. passport. Under cross-examination, Applicant admitted that he could travel as a non-Israeli citizen to Israel. He would have to wait in the non-Israeli citizen line while arriving in the country. (Tr at 64)

In June 2007, Applicant and his family traveled to Israel on a two-week sightseeing tour. In October 2000, he traveled to Israel alone to visit family, staying for approximately 10 days. In the past, Applicant's employer sent him to Israel on business trips. His employer had a partnership with an Israeli defense company to develop a missile for the U.S. Air Force. Applicant traveled to Israel on company business from June 1996 to December 1996, from October 2001 to December 2001, and for one week in July 2003. (Tr at 44-47, 89; Gov 3)

Neither Applicant nor his wife and children receive benefits from Israel. He has no investments in Israel. He owns a home in the U.S. and all of his investments are located in the U.S. (Tr at 20, 72-73, 89; Gov 3; Gov 4)

On November 14, 2007, Applicant was interviewed in conjunction with his background investigation. During the interview the subject of Applicant's possession of

a valid Israeli passport was discussed. During the interview, Applicant stated that he will relinquish his Israeli passport to his employer but would like to have it returned when he wants to travel to Israel in the future. (Gov 3 at 7)

On April 29, 2008, he affirmed this statement in response to interrogatories sent to him by the Defense Office of Hearings and Appeals. He states:

> I have indicated that I have no issues of surrounding my passport to the company security office for storage until my need to go to Israel for a visit again. If I am correct, I asked the security manager at Lockheed Martin if they can hold/keep my passport, and getting it back to me upon request before going back to visit in Israel, but he said that they do not have the mechanism or the system to do so. (Gov 3 at 11)

At hearing, Applicant stated that he is willing to renounce his Israeli citizenship and surrender his Israeli passport. Prior to the hearing, he inquired about the process at the Israeli consulate. They informed him that it would take approximately one year. Applicant believes that he cannot surrender his Israeli passport to the Israeli Consulate until after the renunciation of his Israeli citizenship is complete. Applicant did not begin proceedings to renounce his Israeli citizenship and/or surrender his Israeli passport prior to the hearing. He was willing to surrender his Israeli passport to the company Facility Security Officer (FSO) pending the process of the renouncing his Israeli citizenship. (Tr at 18, 21, 58-68)

Applicant is concerned that he may need his Israeli passport to visit his mother should she become ill. If something should happen to his mother, he may ask the FSO to have his Israeli passport returned to him in order to travel to Israel to visit his mother. He was advised on several occasions during the hearing that if he does so it will raise a security issue and could result in the revocation of his security clearance. (Tr at 61-62, 64-65, 67, 150)

Applicant testified that he would surrender his Israeli passport to the FSO within a week of the hearing. (Tr at 62) He claims the FSO told him that in other cases, applicants surrendered their foreign passports to the FSO and the passport was physically destroyed and sent the government a letter confirming the passport was destroyed. Applicant testified,

> …..With my case he cannot do it because this is – this is Israeli property.
>
> So I told him [the FSO] he cannot destroy it because I'll be penalized. So I have to go by the United States rules and the Israeli rules as long as I have this. And I am willing to do this.(Tr at 66, lines 16-21)

Applicant was not willing to destroy his Israeli passport because he believed it violated Israeli law. (Tr at 66-67)

Upon listening to Applicant's testimony that he intended to surrender his passport to his FSO pending the renunciation of his Israeli citizenship, Department Counsel stated they had no objection to leaving the record open for a period of time to allow Applicant to surrender his passport to his facility security officer. (Tr at 64, lines 8-12) I held the record open for two weeks (until March 10, 2009) to allow Applicant to submit evidence that he surrendered his Israeli passport to his FSO. (Tr at 64, lines 14-26.) Applicant responded: "That's enough sufficient time as I said to Mr. Duffy I am willing to do it this week." (Tr at 64, lines 17-19)

At the close of the hearing, I told the Applicant:

> Administrative Judge: We will hold the record open until two weeks from today, related to the passport issue. And for some reason if you would need additional time, if you would contact [Department Counsel] and he will let me know and I can probably give you another week extension.
>
> Applicant: So you want me to start the process to surrender my passport to [my FSO], he's the security manager at [my company].
>
> Administrative Judge: Yes.
>
> Applicant: I will do it. (Tr at 149, lines 8-19)
>
> Administrative Judge: It's, like he can prepare an affidavit saying that he has accepted –
>
> Applicant: You want me to have him write a letter and sent to [Department Counsel]?
>
> Department Counsel: If he doesn't have a standard form, he can contact me. We could give him a sample of what it would look like.
>
> Applicant: Sure. Yes. And as I said, I am willing to postpone my trip to Israel this year and wait for your decision and obviously wait and postpone my trip until everything is over because of renouncing my citizenship and surrendering the passport, is completed.
>
> Department Counsel: You understand that if you go back and get your passport from [the FSO] once you have surrendered it, you have triggered again a security concern.
>
> Applicant: Yes. Yes.
>
> Department Counsel: It could end up in the revocation of a clearance if the judge decided to grant your clearance today.

Applicant: Yes, I do. Thank you. (Tr at 149, lines 8-25, 150, lines 1-16)

No additional documents were submitted during the two week period the record was left open. I contacted Department Counsel at the close of the record to inquire whether Applicant had contacted Department Counsel or submitted anything. Applicant had not contacted Department Counsel.

Applicant claims in AE F, dated April 1, 2009, that there was a miscommunication between him and his security department. He claims that in similar cases the court has forwarded a letter of instruction at the completion of the case which provides direction to the security office. His security office thought such a letter would be forthcoming with instructions. He claims that he did not understand that the directions provided at the hearing were all that would take place. He attached a letter from his FSO which verified that he surrendered his valid Israeli passport to the FSO on April 1, 2009, eight days after the adverse decision was issued. (AE F)

The two pages of additional evidence that was not contained in the file during the first remand consist of an apparent e-mail sent by Applicant to his FSO one day after the hearing. In the e-mail Applicant claims that the administrative judge told him the Appeal Verdict will be sent to his home address by March 10, 2009. He states that he will surrender his Israeli passport to the FSO and if the FSO needed further instructions of how to do it, the FSO can call Department Counsel. He then asks when he should bring his Israeli passport to the FSO.

Applicant's FSO apparently sent a reply e-mail that same day. He stated to Applicant:

> I checked the paperwork for the passport that I am holding and DOHA sent a letter covering the handling of the passport and form that they wanted filled out and notarized in order for me to hold the passport. The letter has specific instructions for handling the passport while in my possession. I would expect a similar letter to come with a form attached for your passport, is that what you believe will happen? (AE G)

Applicant indicated on page 2 of AE G that his verbal reply to the FSO was that he agreed with the FSO and he will wait for further instructions from DOHA even though this was contrary to what was discussed at hearing.

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 useful in evaluating 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. The administrative judge's over-arching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(c), 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.

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 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.

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 applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters 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.

Section 7 of Executive Order 10865 provides that 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." *See also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

The concerns under Guideline B, Foreign Influence, and Guideline M, Use of Information Technology Systems, will not be addressed because they were not the basis for the remand decision.

Guideline C, Foreign Preference

The security concern relating to the guideline for Foreign Preference is set out in AG ¶9:

> 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.

The guideline notes several disqualifying conditions that could raise security concerns. Foreign Preference Disqualifying Condition (FP DC)10(a) (*exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through foreign citizenship of a family member. This includes but is not limited to: (1) possession of a current foreign passport*); and FP DC ¶ 10(b) (*action to acquire or obtain recognition of a foreign citizenship by an American citizen*) apply. Applicant renewed his Israeli passport after becoming a U.S. citizen on June 27, 1980. The record evidence indicates Applicant renewed his Israeli passport on June 19, 1996. This passport expired on June 18, 2001. He also renewed his Israeli passport on March 12, 2007. The passport does not expire until March 11, 2017. Applicant was entitled to an Israeli passport by virtue of his status as an Israeli citizen. Applicant traveled to Israel using his Israeli passport in June 2007, and October 2000. He also traveled to Israel using his Israeli passport while on company business from June 1996 to December 1996, October 2001 to December 2001, and for one week in July 2003. His renewal of his Israeli passport and his use of his Israeli passport to travel to and from Israel is an exercise of foreign citizenship.

Applicant arranged for his children to obtain Israeli passports when they traveled to Israel in 2007. They are U.S. citizens who were born in the U.S. and could have used U.S. passports. This action also indicates a preference for his home country. While not alleged in the SOR under foreign preference, the Appeal Board has determined that even though crucial security concerns are not alleged in the SOR, the Judge may consider those security concerns when they are relevant and factually related to a disqualifying condition that was alleged in the SOR. ISCR 05-01820 at 3 n.4 (App. Bd. December 14, 2006) (citing ISCR Case No. 01-18860 at 8 (App. Bd. March 17, 2003) and ISCR Case No. 02-00305 at 4 (App. Bd. February 12, 2003)).

Since Applicant admitted the SOR allegations and the government produced substantial evidence by way of exhibits to raise disqualifying conditions FP DC ¶ 10(a) and FP DC ¶ 10(b), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns (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 (DOHA Appeal Board Decision, September 22, 2005)).

The guideline also includes examples of conditions that could mitigate security concerns arising from Foreign Preference.

Foreign Preference Mitigating Condition (FP MC) ¶ 11(a) (*dual citizenship is based solely on parents' citizenship or birth in a foreign country*) does not apply. While

Applicant was born and raised in Israel, he continued to exercise his Israeli citizenship after becoming a U.S. citizen. He renewed his Israeli passport on several occasions and used it to travel to and from Israel. His application for and use of a foreign passport after becoming a U.S. citizen was an exercise of dual citizenship and reveals a continued preference for his home country.

FP MC ¶ 11(b) (*the individual has expressed a willingness to renounce dual citizenship*) applies. Applicant testified that he intended to renounce his Israeli citizenship. He testified that prior to the hearing, he contacted the Israeli consulate about the steps required to renounce his Israeli citizenship but had not started the process to renounce his Israeli citizenship. FP MC ¶ 11(b) is given less weight because while Applicant expressed an intention to renounce his Israeli citizenship during the hearing, he also expressed a concern that he may need his Israeli passport in the future to travel to Israel to visit his mother. There is no evidence in the record that he took the formal steps to renounce his Israeli citizenship.

FP MC ¶ 11 (c) (*exercise of rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor*) does not apply. Applicant was an adult when he became a U.S. citizen. After becoming a U.S. citizen, he exercised his Israeli citizenship by renewing his Israeli passport and using his Israeli passport as opposed to his U.S. passport when traveling to Israel.

FP MC ¶ 11 (d) (*use of a foreign passport is approved by the cognizant security authority*) does not apply to the facts of this case.

FP MC ¶ 11(e) (*the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated*) does not apply. Applicant did not take steps to mitigate the concerns raised by his possession and use of a valid foreign passport before the hearing. He was first put on notice that his possession of a valid foreign passport was a security issue when he was interviewed during his security clearance background investigation on November 14, 2007. He was put on notice again when the Defense Office of Hearings and Appeals sent him interrogatories which he answered on April 29, 2008. On November 14, 2008, he was served the SOR which clearly stated his possession of a valid Israeli passport was an issue under the foreign preference concern as stated in Guideline C of the Directive. He was provided a copy of the Directive with his SOR. The Directive lists the disqualifying and mitigating conditions under Guideline C. He was on notice as to what steps to take to mitigate the concerns raised under foreign preference. He took no steps to mitigate this issue prior to his hearing which occurred on February 24, 2009.

Although Applicant expressed his intent to surrender his valid foreign passport to his FSO during the hearing, it was clear he had reservations about surrendering his Israeli passport. He testified that he may need to ask his FSO to return his Israeli passport in the future in order to visit his mother. This was not the first time that he indicated that he might have to ask for his Israeli passport back if he needs to travel to

Israel. He initially stated that he was willing to surrender his Israeli passport to his FSO during his background investigation interview on November 14, 2007, but would like to have it returned to him when he wants to travel to Israel in the future. He reaffirmed this statement in response to interrogatories on April 29, 2008, stating that he has no issues of surrendering his passport to the company security office for storage until his need to go to Israel for a visit again.

FP MC ¶ 11(e) gives Applicant several options. He could have destroyed the passport; he could have surrendered it to the cognizant security authority; or otherwise invalidate it. Applicant could have destroyed or invalidated the passport prior to hearing. He chose not to do so out of concern that he would violate Israeli law. He decided not to surrender the passport to the Israeli consulate. He decided his option would be to surrender the passport to his FSO. However, he did not surrender the passport to his FSO within the two weeks that the record was held open after the hearing. He did not contact Department Counsel or the Hearing Office to ask questions about the proper way to surrender his foreign passport to his FSO. Regardless, Applicant's repeated comments that he may have to ask for it back if the need to travel to Israel arises in the future leads me to conclude that his surrender is a conditional one. A security concern remains under foreign preference.

Applicant was or should have been aware that possession of a valid foreign passport was a security issue for more than 14 months prior to the hearing. He did not take action until after the record was closed and an adverse decision was issued. Applicant was provided sufficient instructions at the hearing on what needed to be done to show proof of surrender of his foreign passport to his FSO. He was advised if he needed additional time, he could submit a request for an extension of time. Although not required to, Department Counsel advised Applicant to call him if he needed a sample memorandum for his FSO to use to verify the surrender of his foreign passport. Applicant was never told to wait for further instructions from the government.

The burden was always on Applicant to mitigate the security concerns raised pertaining to his possession of a valid foreign passport. Considering the extensive instructions provided to Applicant during the hearing, his assertion that he was awaiting further instructions from the government after the hearing is not credible.

Applicant's renewal, possession and use of an Israeli foreign passport over a number of years after becoming a U.S. citizen indicates that he still has a preference for a foreign country. Although not alleged in the SOR under Guideline C, the fact that he arranged for his family to obtain Israeli passports prior to traveling to Israel in 2007, reinforces a preference for his home country. Although he eventually surrendered his valid foreign passport to his FSO, his equivocations about surrendering his foreign passport during the hearing, his numerous statements that he may need to ask for it back in the future if he needs to travel to Israel, and his extensive delay in taking action to surrender his foreign passport does not mitigate the foreign preference security concern. Security concerns under foreign preference are not mitigated.

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) the 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 commonsense 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. I considered Applicant's ties to the U.S. as well his relationship with his mother and two brothers who are citizens of and reside in Israel. I considered Applicant's work history and the favorable testimony from Applicant's current and former co-workers.

I considered Applicant's explanations in AE F and AE G as to why he did not surrender his Israeli passport prior to the close of the record. The record evidence contradicts his assertions and I do not find his explanation credible.

Applicant had ample time prior to the hearing to address concerns related to his possession of a valid foreign passport. He did not do so but professed at hearing that he intended to do so within a week following the hearing. The record was held open for two weeks to allow him the opportunity to do so. Applicant had the burden to mitigate the security concerns raised under Guideline C involving the possession of a valid foreign passport. He ignored the instructions provided to him at hearing and did nothing during the two weeks the record was held open. The burden was on Applicant to mitigate the foreign preference concerns not the government or his security office. He took no action to ensure that his foreign passport was surrendered before the close of the record.

The DOHA Appeal Board has held in the past that an Applicant's argument regarding his lack of knowledge is not persuasive:

> Applicant's argument regarding his lack of knowledge is not persuasive. On June 24, 2004, Applicant received the ASDC3I memorandum (Money memo) dated August 16, 2000, which spells out the Department's policy

> on this matter. Applicant provided a submission to the Administrative Judge, dated July 18, 2004. Applicant had an opportunity to review the Money memorandum before he provided his last submission, yet he did not surrender the passport or request additional time to do so. Now that the record is closed and the Judge has issued an adverse decision. Applicant requests that the Board grant him one month to surrender the passport. The Board is not permitted to consider new evidence on appeal. *See,* Directive, Additional Procedural Guidance, Item E3.1.29. ISCR Case 02-23506 at 3 (Appeal Board Decision, February 16, 2005.) *see also* ISCR Case 02-12733 at 3 (Appeal Board Decision, December 19, 2003)

Applicant's case is distinguished in that the Money memorandum no longer applies. However, Applicant received the SOR on November 14, 2008. He was provided a copy of the Directive in conjunction with the SOR. He had the opportunity to review the disqualifying and mitigating conditions that were raised under the foreign preference concern. More than three months passed prior to his hearing. He took no action with regard to the possession of his foreign passport. At hearing, he expressed an intent to surrender the passport to his FSO, albeit with comments that he may need to ask for it back if he needed to travel to Israel. The record was held open two weeks after the hearing to give Applicant time to surrender his Israeli passport to his FSO. It was his burden and his responsibility to surrender the passport prior to the close of the record. He took no action until after he received the initial adverse decision, dated March 24, 2009.

Applicant ultimately surrendered his valid foreign passport to his security office but only after his security clearance was denied. Prior to doing so, Applicant indicated on several occasions during his background investigation including during the hearing that he may need to ask for it back the next time he travels to Israel. Considering these statements, I cannot conclude that it was an unqualified surrender of his foreign passport. Doubts remain under the foreign preference concern. Clearance is denied.

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 B:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant

Paragraph 2, Guideline C:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline M:	FOR APPLICANT
Subparagraph 3.a:	For 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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

_____
ERIN C. HOGAN
Administrative Judge