



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-04573
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: B. Daniel Lynch, Esquire

June 4, 2009

Decision

ROSS, Wilford H., Administrative Judge:

Applicant submitted her Electronic Questionnaire for Investigations Processing (e-QIP), on July 3, 2007 (Government Exhibit 1). On October 9, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant, which detailed security concerns under Guidelines C and B stating why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked. 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 President Bush 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 October 22, 2008. She answered the SOR in writing on November 26, 2008, and requested a hearing before an Administrative Judge. The case was assigned to another Administrative Judge on January 8, 2009. The case was reassigned to me on February 10, 2009. DOHA issued notices of hearing on January 9, 2009, and January 28, 2009. I convened the hearing as scheduled on February 12, 2009. The government offered Government Exhibits 1 through 3, which were received without objection. The Applicant testified on her own behalf, called two additional witnesses and submitted Applicant's Exhibits A through Q, without objection. DOHA received the transcript of the hearing on February 25, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural Ruling

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to The State of Israel. (Transcript at 23-30.) The request and the attached documents were not admitted into evidence but were included in the record. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

The Applicant is 48, married, and has a Master of Science degree. She is employed by a defense contractor and seeks to retain her security clearance in connection with her employment. In her Answer to the SOR, dated November 26, 2008, Applicant admitted subparagraphs 1.a., 1.b., 2.a., and 2.b. of the SOR, with explanations. She denied subparagraphs 1.c. and 1.d. She also provided additional information to support her request for eligibility for a security clearance.

Paragraph 1 (Guideline C - Foreign Preference)

The Government alleges in this paragraph that the Applicant is ineligible for clearance because she has acted in a way that shows a preference for another country ahead of the United States.

The Applicant was born in the United States in 1960. Her family moved to Israel in 1970. The Applicant lived in Israel until 1981, when she returned to the United States with her family. During her time in Israel she became an Israeli citizen, and remains one to this day. (Transcript at 82-84.) In accordance with Israeli law, the Applicant served two years in the Israeli Defense Forces (IDF) from the years 1979 to 1981. She was offered an opportunity to be an officer in the IDF, but turned them down. (Transcript at 84-85.)

The Applicant had an Israeli passport. In November 2004, the Applicant renewed this passport. It expired in October 2008. (Government Exhibit 3 at 22-39.) She submits that she only uses the passport to travel to Israel because Israeli law requires it. Beginning in 2007, the Applicant had several conversations with her employer's security department concerning her Israeli passport. According to the Applicant, she was given inconsistent advice by the security department. On October 31, 2008, the Israeli government confirmed that the Applicant had deposited her Israeli passport with them and that she had received permission to travel to Israel using her American passport. (Transcript at 96-103, 131; Applicant's Exhibit Q.)

The Applicant is still a dual citizen of Israel and the United States. The totality of the record shows that the Applicant is very reluctant to take the steps to renounce her Israeli citizenship. The Applicant's primary reasons for not renouncing her Israeli citizenship appears to be that the act of "renunciation" would be offensive to her relatives, and the fact that actual renunciation does not appear to be mandated for the granting of a security clearance. (Transcript at 92-93, 132-133.)

Paragraph 2 (Guideline B - Foreign Influence)

The Government alleges in this paragraph that the Applicant is ineligible for clearance because she has foreign contacts and interests that could lead to the exercise of poor judgment, unreliability or untrustworthiness on the part of the Applicant.

The Applicant has two relatives who live in Israel. The Applicant's uncle owns a small business in Israel. The Applicant is close to him and they traveled together in 2008 to the European country where he was born. They correspond primarily through the use of the telephone. (Applicant's Answer at 3-4; Transcript at 93-94.)

The mother of the Applicant's husband also lives in Israel. She is a native born American citizen who has elected to live after retirement in Israel. The Applicant's mother in law visits the United States once a year, to visit friends and family. Other than that, they correspond by means of the telephone. (Transcript at 93-95.) Neither of the Applicant's relatives in Israel have any connection with the Israeli Government or Israeli defense industry.

The Applicant has made ten trips to Israel since moving back to the United States in 1981. The last two trips were in 1998 and 2004. During each of those trips, she presented her Israeli passport to Israeli authorities. (Government Exhibit 3 at 22-39; Applicant's Exhibit P; Transcript at 90-92.) For travel other than to Israel, the Applicant uses her American passport. (Government Exhibit 3 at 6-22; and Applicant's Exhibit P.)

The Applicant was presented with a hypothetical regarding the unlikely event of armed conflict between Israel and the United States. She stated:

I understand that this is a hypothetical situation. I would remove myself from a conflict of interest. I have done that before in conflict of interest situations, and I am not - - since I am above board - - both countries know that I am a dual citizen. I seriously doubt anybody would put me in a position to make such a choice, but I would find a way to remove myself from the conflict. (Transcript at 137.)

The Applicant was subsequently asked if, “your choice is not to make a choice?” (Transcript at 138.) She replied, “I think that’s right. I would remove myself from having to make a choice.” (*Id.*)¹

She confirmed this attitude on page 140 of the Transcript. There, in response to a question by Department Counsel, she said:

If the law has to do with harming an Israeli Citizen or the law involves violating a United States law, I would find a way to bow out of that, and I am not shy about speaking up. I’ve removed myself from conflicts of interest situations before. (Transcript at 140)²

The Applicant has many contacts with Israel. Accordingly, it is appropriate to discuss the situation in Israel at this time.³ Israel is a parliamentary democracy. Israel’s prime minister leads the executive branch of the government. The United States is Israel’s leading trading partner. Israel respects the rights of its citizens; however, there are some concerns about Israel’s detention and interrogation of alleged terrorists, and discrimination against Arabs. Terrorism is a continuing threat to Israel, and American interests in Israel. Since 1948, the United States and Israel have developed a close friendship based on common democratic values, religious affinities, and security interests. Occasionally, Israeli and American interests have diverged. Several U.S. government employees have been prosecuted for disclosure of classified information to persons connected to the Israeli government. Israel has an active program to gather proprietary information from U.S. companies.

¹The transcript incorrectly identifies this statement as being by the Applicant’s counsel. The copy of the transcript retained by the United States has been corrected by me to show that the statement was made by the Applicant.

²The Applicant describes such a situation involving her employer and a third country, not Israel, on pages 140 and 141 of the Transcript.

³All of the following statements are supported by the documents submitted by the Department Counsel in support of his request for administrative notice and its attachments.

Mitigation

The Applicant is a highly respected person in the defense industry. Two retired military officers, who have worked with the Applicant as contractors, testified on her behalf. They describe her as a competent, hard working and respected employee. (Transcript at 55, 73-74.) Each of them made a particular point that the Applicant is known to be a stickler for security rules. (Transcript at 58, 64 and 73.) Both of the witnesses highly recommend her for a position of trust. (Transcript at 62, 72-73.)

The Applicant also submitted letters and other documents. They show that the Applicant is highly respected by members of the United States military and that her talents have helped the defense efforts of the United States. (Applicant's Exhibits A, B, C, D, E, I and J.) In addition, she provided information showing that she is knowledgeable about her responsibilities as a security clearance holder. (Applicant's Exhibits K and L.) Finally, she submitted documentary information showing her standing in the community, which is high. (Applicant's Exhibits F, G and O.) (Transcript at 106-125.)

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 common sense 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. In addition, the Administrative Judge may also rely on his own common sense, as well as his knowledge of the law, human nature, and the ways of the world, in making a reasoned 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. 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 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.

Finally, as emphasized by President Eisenhower in Section 7 of Executive Order 10865, “Any determination under this order . . . 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.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant is a dual citizen of Israel and the United States, that she served in the Israeli military and that she had a valid Israeli passport (Guideline C); and that the Applicant has family members overseas and close emotional ties with the State of Israel itself (Guideline B). The Applicant, on the other hand, has not successfully mitigated the Government's case, except in part. Subparagraphs 1.c., 1.d. and 2.c. are found for the Applicant as I find her traveling to Israel on her Israeli passport, as well as her possession of such a passport, has no current security significance.

Paragraph 1 (Guideline C - Foreign Preference)

Turning first to Guideline C, the Applicant has not mitigated the Government's concerns about her dual citizenship with Israel. The concern is stated thus under this Guideline, *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 Applicant served in the Israeli Defense Forces over 20 years ago. Under other circumstances, that span of time would mitigate this service. However, given her obvious continuing emotional ties to Israel, as discussed in depth above, I cannot find that her service is mitigated. Disqualifying Condition 10(a)(2) applies to the facts of this case: *Conditions that could raise a security concern and may be disqualifying include: (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: (2) military service or a willingness to bear arms for a foreign country.* (Emphasis supplied.)

The Israeli Consulate General currently holds the Applicant's passport. It remains a valid passport, even though expired, available to the Applicant on demand as an Israeli citizen, and has not "*been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.*" However, there is some evidence that the Applicant was given conflicting evidence by her security office with regards to how to properly dispose of the passport. Accordingly, while Mitigating Condition 11(e) does not apply to this case, under these particular circumstances subparagraph 1.b. is found for the Applicant.

Under any analysis of the evidence, it is obvious that the Applicant would like to retain her Israeli citizenship. In fact, she repeatedly stated that she would not renounce her Israeli citizenship. As has been discussed, the Applicant has a close, emotional relationship with the State of Israel. While such feelings are not wrong, they do mean that Mitigating Condition 11(b) does not apply to this case: *the individual has expressed a willingness to renounce dual citizenship.* For all the foregoing reasons, Guideline C is found against the Applicant.

Paragraph 2 (Guideline B - Foreign Influence)

The concern under Guideline B is styled 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.

The Applicant may only have two relatives there, but it is obvious that she has a close emotional relationship with the State of Israel itself. That is not unusual, she did serve in the Israeli Defense Forces and lived there for 18 years. Nor does this show that she is an unpatriotic or disloyal American citizen. What is troubling is that the Applicant, though given several opportunities, could not state an unequivocal preference for the United States in any conflict, no matter how remote, with the State of Israel. Rather, in her own words, in such a situation she would “remove myself from having to make a choice.” (Transcript at 137.)

Her reluctance or inability to state an unequivocal preference for the United States must also be viewed in the context of the Israeli government, and in particular that government’s history of attempting to obtain classified and other information from American companies. To her credit, the Applicant repeatedly stated that she is a loyal American citizen, that she understands her responsibilities as a security clearance holder, and that she would not be a party to any attempt by the Israeli government to obtain information from her. In fact, it is obvious that she knows and follows all security rules to the letter. However, given the depth of her current connections with Israel, she has failed to meet her burden of showing an unequivocal connection to the United States.

Based on the evidence the Government has presented, the following Disqualifying Conditions apply to this case: 7.(a) *Contact with a foreign family member . . . 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; and (b) connections to a foreign person . . . 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 . . . or country by providing that information.* (Emphasis supplied.) I have also considered the information concerning the Israeli government, provided by Department Counsel in his request for administrative notice and its attachments.

The Applicant has not provided compelling evidence to show that the following Mitigating Conditions also apply to this particular case, given her particular background: 7(a) *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.; and (b) 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. (Emphasis supplied) Paragraph 2 is found against the Applicant.

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 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. Two of the factors have the most impact on this case. First, I cannot find that there is the "presence or absence of rehabilitation and other permanent behavioral changes," as set forth under AG ¶ 2(a)(6). The Applicant simply has not engaged in sufficient conduct which shows a preference for the United States instead of Israel. Such conduct might include her taking the actions concerning her Israeli passport set forth in Mitigating Condition 11(e). In addition, she could actively engage in renouncing her Israeli citizenship. The lack of any of the actions stated above make it impossible for me to find that there is little or no "potential for pressure, coercion, exploitation, or duress" as set forth in AG ¶ 2(a)(8).

There is nothing in the record that suggests Applicant is anything but a loyal American citizen. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. As stated earlier, Section 7 of Executive Order 10865 specifically provides that industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Therefore, nothing in this decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied concern as to Applicant's allegiance, loyalty, or patriotism.

On balance, it is concluded that the Applicant has not successfully overcome the Government's case opposing her request for a DoD security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons.

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 THE APPLICANT
Subparagraph 1.a:	Against the Applicant
Subparagraph 1.b:	Against the Applicant
Subparagraph 1.c:	For the Applicant
Subparagraph 1.d:	For the Applicant
Paragraph 2, Guideline B:	AGAINST THE APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against 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 national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

WILFORD H. ROSS
Administrative Judge