DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 08-05497
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Daniel F. Crowley, Esquire, Department Counsel
For Applicant: *Pro se*

November 12, 2008

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86) on June 29, 2006. On August 13, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny him application, citing security concerns under Guidelines B (Foreign Influence) and C (Foreign Preference). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on August 25, 2008; answered it on the same day; and requested a hearing before an administrative judge. The case was assigned to me on September 9, 2008. DOHA issued a notice of hearing on September 16, 2008. I convened the hearing as scheduled on October 16, 2008. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Applicant testified on

his own behalf, and presented the testimony of one witness. Applicant submitted Exhibits (AX) A-C, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on October 22, 2008. Eligibility for access to classified information is granted.

Procedural and Evidentiary Rulings

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to Israel (Tr. 9). The request and the attached documents are included in the record as Hearing Exhibit I. Hence, the facts administratively noticed are limited to matters not subject to reasonable dispute. The facts administratively noticed are set out in the Findings of Facts, below.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a, 1.b, 1.c, 1.d, and ¶¶ 2.a, 2.b, and 2.c. His admissions in his answer to the SOR and at the hearing are incorporated in my findings of fact. I make the following findings:

Applicant is a 31-year-old man. He has been employed as an information specialist with a defense contractor since October 2005. He is regarded by his employer as a valuable asset to the company. Applicant may be involved in certain projects that require a security clearance (AX A).

Applicant was born in Israel and moved to the United States (U.S) when he was nine months old (Tr. 11). He graduated from high school in 1993. He graduated from college in 2000. After college, he worked in his area of expertise. He completed his Master's degree in 2005 (Tr. 29).

Applicant's parents are divorced and living in the U.S. His father is a naturalized U.S. citizen. His mother was born in the U.S. They were married in Israel. Applicant has one brother (Tr. 34). While growing up in the U.S., Applicant visited Israel with his parents on a few occasions (Tr. 40).

Applicant's extended family from his father's side (an aunt and cousins) live in Israel. Applicant's cousins are citizens and residents of Israel. (Tr. 35). He has little or no communication with them. He visited with them on past trips to Israel for approximately one hour (Tr. 36).

In 2003, Applicant studied in Israel for a period of approximately three months. The program involved American students who wanted to learn more about their religion. In 2004, Applicant attended the short program again (Tr. 38). This program is funded by philanthropists.

In March 2005, Applicant married. His wife was born in Israel to American parents. Her parents emigrated to Israel and returned to the U.S. after a few years. She

has extended family in Israel. Her grandparents are there and she communicates with them a few times a year. Her grandfather has a private importing business (Tr. 37).

After his marriage, Applicant visited Israel with his wife. They stayed with his wife's grandparents and also in hotels in the country. The visit was a wedding trip (10 days) and an opportunity to visit his wife's grandparents (Tr. 38).

In December 2007, Applicant told a security investigator he maintained dual citizenship because it makes it easier to travel to and from Israel. At that time, he had a valid Israeli passport that would expire in May 2016. Applicant used that passport when he traveled to Israel. He explained that due to Israeli law he had a passport so that he could enter and exit the country in previous times (AE A). He had renewed his passport in 2006 so that he could travel with his wife.

In September 2008, Applicant surrendered his Israeli passport to the Israeli Consulate to be invalidated (AE B). He wrote to the consulate and initiated the process of formal renunciation of his Israeli citizenship. The passport is stamped "cancelled."

Applicant was candid and straightforward at the hearing. He has no plans to visit Israel and if he does it will be on a U.S. passport. He has no property in Israel. He has never voted in an Israeli election nor has he served in their military (Tr. 47).

Applicant's manager praised Applicant for his exemplary work. He hired Applicant as an intern in 2002 and has known him for several years. Applicant has a very strong work ethic, and holds himself to a high standard and takes responsibility for his duties. Applicant's manager traveled with Applicant for work and conferences and attested to his loyalty. He recommends him for a security clearance without reservation (Tr. 24).

I take administrative notice of the following facts about Israel.[1] Israel is a parliamentary democracy with a diversified, technologically advanced economy. Almost half of Israel's exports are high technology, including electronic and biomedical equipment. The U.S. is Israel's largest trading partner. Israel has been identified as a major practitioner of industrial espionage against U.S. companies. Israel generally respects the rights of its citizens. When human rights violations have occurred, they have involved Palestinian detainees or Arab-Israelis. Terrorist suicide bombings are a continuing threat in Israel, and U.S. citizens are advised to be cautious. The U.S. and Israel have close cultural, historic, and political ties. They participate in joint military planning and training, and have collaborated on military research and weapons development. Commitment to Israel's security has been a cornerstone of U.S. Middle East policy since Israel's creation in 1948.

Policies

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

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

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

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

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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

Analysis

Guideline B (Foreign Influence)

The SOR alleges Applicant's extended family members are citizens and residents of Israel. (SOR ¶ 2.a). It also alleges Applicant's wife's relatives in Israel are U.S. citizens (¶ 2.b). Finally, it alleges Applicant traveled to Israel to study in 2003, 2004, and 2006 (¶ 2.c). The security concern relating to Guideline B is set out in AG ¶ 6 as follows:

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

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

Since the government produced 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). 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). Similarly, AG 8© "contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation." Applicant has contacts with extended family members living in Israel and through his wife to her family in Israel so that these two mitigating conditions cannot be fully applied.

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.

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." All members of Applicant's immediate family are U.S. citizens and live in the U.S. AG ¶ 8(b).Applicant has lived in the U.S. his entire life. He received his education in the U.S. He has visited Israel a few times in his lifetime. He has his family and property in the U.S. His career is in the U.S. Applicant's testimony at the hearing showed his willingness to sever his ties to Israel. As such, his testimony supported this mitigating condition.

Guideline C (Foreign Preference)

The SOR alleges Applicant, born a U.S. citizen, has dual citizenship with Israel (¶ 1.a), possessed an Israeli passport in June 2006 that would expire in May 2016 (¶ 2.b), used his Israeli passport for travel to Israel (¶ 2.c), and applied for an Israeli passport in 2006 even though he was a U.S. citizen by reason of birth in the U.S.(¶ 2.d). The concern under this guideline is set out in AG ¶ 9 as follows: "When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States."

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

A disqualifying condition may arise from "exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen," including but not limited to "possession of a current foreign passport." AG ¶ 10(a)(1). Applicant possessed an Israeli passport prior to the hearing and traveled to Israel on that passport. AG ¶ 10(a)(1) is not established because Applicant surrendered the passport in September 2008. Thus, Applicant does not have a "current foreign passport."

Nevertheless, the record established, as noted above, that Applicant exercised his Israeli citizenship by using his Israeli passport on numerous occasions. The disqualifying condition under AG ¶ 10(a) is raised, even though none of the illustrative examples are applicable. The burden shifted to Applicant to rebut, explain, mitigate, or extenuate the facts. Several mitigating conditions are potentially relevant.

Security concerns under this guideline may be mitigated by evidence that "dual citizenship is based solely on parents' citizenship or birth in a foreign country." AG ¶ 11(a). This mitigating condition does not apply in this case.

Security concerns under this guideline also may be mitigated if "the individual has expressed a willingness to renounce dual citizenship." AG ¶ 11(b). Applicant has written to the consulate and initiated the process of renouncing his dual citizenship. His testimony was sincere and credible on this issue. AG ¶ 11(e) "the passport has been destroyed, surrendered to the cognizant security authority, or otherwise is invalidated" applies because the passport was surrendered or invalidated by the Consulate.

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) 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 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.

There are significant factors supporting the approval of Applicant's access to classified information. Applicant is a mature, well-educated, and very intelligent adult. He loves his family and is proud of his culture and heritage. He is a U.S. citizen who received his education in the U.S. and lived his entire life in the U.S. his employment and investments are in the U.S.` He has a longstanding loyalty to the U.S. Although his spouse was born in Israel, his immediate family lives in the U.S. and are U.S. citizens. His employer praises Applicant for his diligence and dedication. Israel is a longtime U.S. ally. I do not believe he is a threat to the United States, but rather an honest, hard-working young man.

Applicant was born in Israel and was a dual citizen by birth. He had an Israeli passport which he used when traveled to Israel in 2003, 2004 and 2006. However, he has surrendered the passport and it is invalid. He has initiated the process of renouncing his Israeli citizenship. He has mitigated the foreign preference security concerns by his recent actions.

After weighing the disqualifying and mitigating conditions under Guidelines B and C, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on foreign influence and foreign preference. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

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

Paragraph 1, Foreign Preference: FOR APPLICANT

Subparagraphs 1.a-1.d:	For Applicant
Paragraph 2, Foreign Influence:	FOR APPLICANT
Subparagraphs 2.a-1.c:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Noreen A. Lynch
Administrative Judge