DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 12-01787
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Erin Thompson, Esq., Department Counsel
For Applicant: Stephen Glassman, Esq.

09/25/2017

Decision

GARCIA, Candace Le'i, Administrative Judge:

Applicant mitigated the foreign preference and foreign influence security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On May 12, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline B (foreign influence) and Guideline C (foreign preference). The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG).

Applicant responded to the SOR on June 30, 2016, and requested a hearing before an administrative judge. The case was assigned to me on May 4, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 16, 2017, scheduling the hearing for June 30, 2017.

I convened the hearing as scheduled. The Government's exhibit list, administrative notice request, and discovery letter were appended to the record as Hearing Exhibits (HE) 1 through 3. Government Exhibits (GE) 1 through 3 were admitted in evidence without objection. Applicant's list of exhibits and witnesses, administrative notice request, and an article written by another attorney were appended to the record as HEs A through C. Applicant testified and submitted Applicant's Exhibits (AE) A through E, which were admitted in evidence without objection.

At Applicant's request and without objection, the record was left open until July 14, 2017, for additional documentation. Applicant submitted documentation that was marked as AE F and admitted without objection. DOHA received the hearing transcript (Tr.) on July 11, 2017. Department Counsel and Applicant requested that I take administrative notice of certain facts about Israel. The facts administratively noticed are summarized in the Findings of Fact, below.

Findings of Fact

Applicant admitted all of the SOR allegations. He is a 39-year-old analyst employed by a defense contractor since March 2015. He worked for a prior defense contractor, at a U.S. Embassy overseas, from January 2008 to February 2009. He worked for another defense contractor from August 2010 to November 2012. He was granted eligibility for a public trust position by another federal agency in 2008. He was granted a DOD security clearance in 2014.[1]

Applicant is a native-born U.S. citizen and resident. He obtained a high-school diploma in the United States in 1996 and a bachelor's degree from a U.S. university in 2001. He was previously married from September 2009 to November 2010. As of the hearing, he was engaged to a native-born U.S. citizen. He does not have any children.[2]

Applicant enlisted and served as an active duty infantryman in the Israeli military from November 2004 to February 2006. Upon completion of his service, he declined an offer to serve in the Israeli military reserves and was honorably discharged. His primary motivation for serving in the Israeli military was to develop the skills and experience that would assist him in furthering a career in security in support of the U.S. Government. He initially desired to serve in the U.S. military, but learned when he spoke to recruiters that he was ineligible due to a longstanding medical condition. He explored alternative options to serve the U.S. Government through security positions with defense contractors and in the private sector, but discovered that all such positions required prior military experience. He did not inquire whether his medical condition would have disqualified him from holding these positions since he did not meet the requisite criteria of prior military service. He did not explore options that did not require prior military

[1] Applicant's response to the SOR; Tr. at 24-25, 70-77; GEs 1-3; AE B.

[2] Tr. at 55-125; GE 1.

experience because such positions would not have provided him with the opportunity to develop skills in his desired field.[3]

Applicant discovered through internet research a program designed for overseas Jewish volunteers who had an interest in serving in the Israeli military, so long as one provided evidence of Jewish heritage. He decided then, at the age of 23, that it was a reasonable option for him to serve in the Israeli military given that the United States and Israel were allies with mutual adversaries. He made this decision on his own. He discussed his decision with his parents, and their conversations revolved primarily around their concern for Applicant's safety.[4]

In 2004, Applicant traveled to Israel to join the Israeli military. Acting on the recommendation that he have a basic proficiency of Hebrew prior to enlistment, Applicant first engaged in a five-month language instruction program. The language program was not affiliated with the Israeli military. He subsequently enlisted and the Israeli military sent him to additional language training.[5]

During the enlistment process, Applicant lied and told the Israeli military that he did not have the medical condition that rendered him ineligible to serve in the U.S. military. He did so because he was told, at an initial enlistment meeting when he arrived in Israel, that his longstanding medical condition, combined with another of his medical conditions, would have lowered his physical profile to such a degree that would have disqualified him from serving as an infantryman. He was previously unaware of this information. He understood from his internet research prior to traveling to Israel that he would be permitted to serve in some capacity despite his medical condition. He also understood that his medical condition was not necessarily a disqualifier for joining the infantry.[6]

Applicant determined that while he was unwilling to lie to the U.S. military and government about this particular medical condition, it was acceptable for him to lie to the Israeli military and government since he did not have any allegiance to them. He was not concerned his medical condition would be discovered because he managed it and was able to maintain a high level of fitness. He disclosed his other medical condition and medical history to the Israeli military. In the 13 years that have passed since his enlistment in the Israeli military, Applicant has matured. He understands now that he should have disclosed his longstanding medical condition to the Israeli military, even if such a disclosure would have prevented him from serving as an infantryman.[7]

[3] Tr. at 55-125; GEs 1-3; AEs A, C.

[4] Tr. at 55-125; GE 3.

[5] Tr. at 55-125; GEs 2-3.

[6] Tr. at 55-125; GE 3.

[7] Tr. at 55-125; GE 3.

Applicant's ex-girlfriend resides in Israel. He met her on an online dating site when he attended the five-month language instruction program in Israel. He lived with her while he was serving in the Israeli military. He last communicated with her in 2007. When Applicant moved back to the United States from Israel in 2007, he had social media contact with her. He also had social media contact with her one sister who also resides in Israel, and several individuals in Israel with whom Applicant served in the Israeli military, to include his unit supervisor. After he received the SOR, Applicant deleted all of his foreign contacts on social media. He had not previously deleted them because he consulted and was advised by a former colleague that doing so at once might trigger to any one of his foreign contacts who might be working in the intelligence field that he was pursuing a sensitive position. He ultimately decided that since he was not in communication with any of his foreign contacts, he did not need to maintain a social media connection with them. Since he deleted his foreign contacts on social media, some have tried to reconnect with him but Applicant has not responded and has no intentions of doing so.[8]

Applicant maintains contact with one individual, a U.S. citizen and resident, with whom Applicant served in the Israeli military. This individual is the founder and CEO of a civilian national service organization that has no connections to the Israeli government or military. As an American Jew, this individual chose to serve in the Israeli military and did so for two years in the same unit as Applicant. He attested that both he and Applicant were low-level infantrymen. Since their discharge from the Israeli military, Applicant and this individual see each other once yearly and communicate approximately twice yearly.[9]

After graduating from college and before he served in the Israeli military, Applicant took a trip to Israel in August 2002 through a birthright program. The program helped teach him about his Jewish culture. Subsequent to his Israeli military service and during a period of unemployment, he traveled to Israel in June 2010 through the same birthright program. On this occasion, he served as a volunteer male counselor to the program. He did not see any of his former Israeli military contacts or his ex-girlfriend during this trip. Both trips were comprised of U.S. citizens, all Jewish Americans, who wanted to travel to Israel to learn more about their Jewish culture. He has not since traveled to Israel. Should he travel to Israel or any foreign country in the future, he understands as a security clearance holder the requirement to report such foreign travel.[10]

Applicant did not have an Israeli security clearance when he served in the Israeli military. He has never been an Israeli citizen, as he was not required to become one in order to serve in the Israeli military, and as such he has never held an Israeli passport. He chose not to become an Israeli citizen or obtain an Israeli passport because he did

[8] Tr. at 55-125; GEs 1-3.

[9] Tr. at 55-125; GEs 1-3; AE F.

[10] Tr. at 55-125; GEs 1-3.

not want to leave any room for misinterpretation as to where his loyalties lie. He has never voted in an Israeli election. He earned $6,000 yearly when he served in the Israeli military. He was required to open a bank account in Israel for the direct deposit of that income. He rented two apartments in Israel as he was required to maintain a home of record during the course of his Israeli military service. Since his discharge from the Israeli military and move back to the United States, he has not received nor does he expect to receive any income or benefits from the Israeli government or military. He also closed his Israeli bank account.[11]

Upon his discharge from the Israeli military, Applicant moved back to and has since lived in the United States. He resided with his parents from March 2006 through January 2008. He moved out of his parents' home and rented at various locations from January 2008 until 2015. Since 2015, he and his fiancée have rented a place together. He was briefly unemployed from February to May 2006, and again from November 2012 to July 2013. He has otherwise worked as a self-employed security consultant or a defense contractor as previously discussed. Applicant and his fiancée have approximately $25,000 in joint savings. Applicant also has approximately $50,000 in retirement assets in the United States. He does not have any assets in Israel.[12]

Applicant testified that his prior Israeli military service cannot be used against him, as his family, friends, and coworkers are aware of it. His parents, sibling, and fiancée are native-born U.S. citizens and residents. His father worked for many years for a defense contractor. His fiancée, who works for the U.S. Government and holds a DOD security clearance, testified that Applicant disclosed his Israeli military service to her when they met in May 2014. She described Applicant as passionate about the United States. Applicant's supervisor also testified that he was aware of Applicant's prior Israeli military service and described Applicant as an exceptional performer, with no reason to question his character, integrity, or loyalty to the United States. Applicant also provided letters of support from his neighbor and mentor, both of whom were also aware of Applicant's Israeli military service and who described Applicant as trustworthy and loyal to the United States.[13]

Israel

Defense, diplomatic, and economic cooperation between the United States and Israel has been close for decades. Strong bilateral relations have fueled and reinforced significant cooperation between the United States and Israel on defense-related matters. Aid for Israel has been designed to maintain Israel's qualitative military edge over neighboring militaries, since Israel must rely on better equipment and training to compensate for a manpower deficit in any potential regional conflict. However, U.S. aid to Israel is not unlimited. Sales of U.S. defense articles and services to Israel are subject to the Arms Export Control Act (AECA) and the July 23, 1952, Mutual Defense

[11] Tr. at 55-125; GEs 1-3; AE F.

[12] Tr. at 55-125; GE 1.

[13] Tr. at 55-125; AEs D-E.

Assistance Agreement between the United States and Israel. AECA enumerates the purposes for which foreign governments can use U.S. military articles and limits the ability of foreign governments to transfer U.S. military products to third party countries without the prior consent of the President of the United States. The 1952 agreement states that the government of Israel assures the United States government that equipment, materials, or services acquired from the United States are required for and will be used solely to maintain Israel's internal security and Israel's legitimate self-defense.

Although the United States has provided regular military support to Israel, there is a significant documented history of classified information and controlled technologies being illegally imported to Israel. These include parts used in fighter jets, spy software, components for certain missiles and fighter jet aircraft, digital oscilloscopes that are capable of being utilized in the development of weapons of mass destruction and in missile delivery fields, a product containing a certain chemical precursor that is controlled for chemical, biological, antiterrorism, and chemical reasons, pressure transducers that are controlled for nuclear non-proliferation reasons, encryption software that is controlled for national security reasons, and classified documents. Illegal technology transfers, even to private Israeli entities, are a significant concern because foreign government entities have learned to capitalize on private-sector technology acquisitions.

In the past 30 years, there have been at least three cases in which employees of the U.S. Government were convicted of disclosing classified information to Israel or of conspiracy to act as an Israeli agent. Reports indicate that concerns regarding possible Israeli espionage persist among U.S. officials. The most prominent espionage case is that of Jonathan Pollard. He pled guilty in 1986, with his then wife, to selling classified documents to Israel. Israel granted Pollard, who is serving a life sentence in a U.S. federal prison, citizenship in 1996 and, in 1998, acknowledged that Pollard had been its agent.

A travel warning issued by the U.S. Department of State for Israel, the West Bank, and Gaza remains in effect, as the security environment remains complex due to heightened tensions and security risks. U.S. citizens are advised that all persons entering or departing Israel, the West Bank, or Gaza are subject to security screening, and may be denied entry or exit. Israeli security officials have on occasion requested access to travelers' personal email accounts or other social media accounts as a condition of entry. In such circumstances, travelers should have no expectation of privacy for any data stored on such devices or in their accounts.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used 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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Exec. Or. 10865 provides that adverse 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* Exec. Or. 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline B, Foreign Influence

The security concern for foreign influence is set out in AG ¶ 6:

> Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they result in divided allegiance. They may also be a national security concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign

> contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

The guideline notes several conditions that could raise security concerns under AG ¶ 7. The following are potentially applicable in this case:

> (a) contact, regardless of method, 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; and
>
> (b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology.

The nature of a nation's government, its relationship with the United States, 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 United States. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. *See generally* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where administrative judge did not consider terrorist activity in area where family members resided).

AG ¶ 7(a) requires substantial evidence of a "heightened risk." The "heightened risk" required to raise one of these disqualifying conditions is a relatively low standard. "Heightened risk" denotes a risk greater than the normal risk inherent in having a family member living under a foreign government.

Applicant has not communicated with his ex-girlfriend in Israel since 2007. When Applicant moved back to the United States from Israel in 2007, he had limited social media contact with her, her one sister, and several other individuals in Israel with whom he served in the Israeli military. He deleted all of his social media foreign contacts after he received the SOR. He has not responded and has no intentions of responding to any attempts by these foreign contacts to reconnect on social media. While Applicant maintains contact with one individual with whom he served in the Israeli military, this individual is a U.S. citizen and resident with no ties to the Israeli government or military. AG ¶¶ 7(a) and 7(b) are not established.

Guideline C, Foreign Preference

The security concern 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 provide information or make decisions that are harmful to the interests of the United States. Foreign involvement raises concerns about an individual's judgment, reliability, and trustworthiness when it is in conflict with U.S. national interests or when the individual acts to conceal it. *By itself;* the fact that a U.S. citizen is also a citizen of another country is not disqualifying without an objective showing of such conflict or attempt at concealment. The same is true for a U.S. citizen's exercise of any right or privilege of foreign citizenship and any action to acquire or obtain recognition of a foreign citizenship.

The guideline notes several conditions that could raise security concerns under AG ¶ 10. The following is potentially applicable in this case:

> (d) participation in foreign activities, including but not limited to:
>
> > (1) assuming or attempting to assume any type of employment, position, or political office in a foreign government or military organization.

Applicant's service in the Israeli military from November 2004 to February 2006 raises AG ¶ 10(d).

Conditions that could mitigate foreign preference security concerns are provided under AG ¶ 11. The following are potentially applicable:

> (f) the foreign preference, if detected, involves a foreign country, entity, or association that poses a low national security risk; and
>
> (g) civil employment or military service was authorized under U.S. law, or the employment or service was otherwise consented to as required by U.S. law.

As a 23 year old, Applicant decided that serving in the Israeli military would enable him to further his desired career in security in support of the U.S. Government. Since his longstanding medical condition, which he determined he did not have to disclose to the Israeli military, rendered him ineligible to serve in the U.S. military, he viewed his decision as a reasonable option. That the United States and Israel were allies with mutual adversaries also factored into his decision. He has matured since then. He acknowledged he should have disclosed his medical condition to the Israeli military. His Israeli military service occurred between 11 and 13 years ago. He no longer has any ties to the Israeli government or military. He has never been an Israeli citizen, he has never held an Israeli passport, and he has never held an Israeli security clearance. AG ¶¶ 11(f) and 11(g) are applicable.

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

> (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 have incorporated my comments under Guidelines B and C in my whole-person analysis. After weighing the disqualifying and mitigating conditions under both guidelines, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the foreign influence and foreign preference security concerns. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

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:	For Applicant
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline B:	For Applicant
Subparagraphs 2.a - 2.b:	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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

_____
Candace Le'i Garcia
Administrative Judge