DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No.: 15-01979
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: *Pro se*

02/08/2017

Decision

CERVI, Gregg A., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence). Eligibility for access to classified information is denied.

Statement of the Case

Applicant completed a Questionnaire for National Security Positions (SF 86)[1] on October 24, 2013. On November 9, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline B, Foreign Influence.[2]

[1] Also known as a Security Clearance Application (SCA).

[2] The action was taken under Executive Order (EO) 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) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on December 10, 2015, and elected to have the case decided on the written record in lieu of a hearing. The Government's written brief with supporting documents, known as the File of Relevant Material (FORM), was submitted by Department Counsel on February 3, 2016.

A complete copy of the FORM was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on March 4, 2016, and in response, forwarded Applicant Exhibits (AE) A through C.

The case was assigned to me on October 19, 2016. The Government's exhibits included in the FORM (Items 1 to 3) are admitted into evidence without objection. In addition, Department Counsel requested I take administrative notice of Government documents from which relevant facts about Israel are derived.

Concerning the facts submitted for administrative notice, Department Counsel requested that I notice cases involving espionage by some U.S. government employees and illegal export cases implicating Israeli officials and companies. While that information is relevant to the issue of whether Israel actively pursues collection of U.S. intelligence and economic and proprietary information, none of the cases involved Applicant personally or involved espionage through any family relationships. The anecdotal evidence of criminal wrongdoing of other U.S. citizens is of decreased relevance to an assessment of Applicant's security suitability, given there is no evidence that Applicant or any member of his family was involved in any aspect of the cited cases. With these caveats, the facts administratively noticed are set forth below.

Findings of Fact

In his answer to the SOR,[3] Applicant admitted all the factual allegations with explanations annotated on the SOR and in a separate document. His admissions and explanations, including corrections made in his response to the FORM, are incorporated in my findings of fact.

Applicant is a 59-year-old senior operations engineer, employed by a defense contractor since 1980. He was assigned overseas since at least 2007. He worked in Turkey from 2007 to 2009; Israel from 2009 to 2014; and South Korea from 2014 to December 2015. He is currently assigned and resides in Taiwan. He has held a security clearance for more than 30 years.[4] He is a U.S. citizen by birth, and is not a citizen of any other country.

Applicant was previously married in 1985 and divorced in 2010. He has two adult children from his first marriage that reside in the United States. He met his current

[3] Item 1.

[4] Item 2; AE B and C.

spouse while he was assigned to work in Israel, and lived with her and at least one stepchild in Israel. He remarried in 2011. His spouse was born in Cyprus, Greece, and is an Israeli citizen.[5] According to Applicant, she is applying for lawful permanent residency status in the United States (green card).[6] She owns a home in Israel, with an estimated value of $120,000.[7] Applicant claims to have no ownership interest in the home.

Applicant's spouse has three adult children, his stepchildren, who are citizens and residents of Israel. His stepchildren live in his spouse's Israeli home.[8] Applicant's spouse and stepchildren completed compulsory military service in the Israeli military. His stepdaughter completed her military service in 2014, and is attending college. She is also applying for permanent residency status in the United States. A stepson graduated from college in 2015 with a degree in accounting, but his current employment is unknown. His other stepson is employed as a restaurant chef, and has two children.[9] Applicant's mother-in-law passed away in 2015. Applicant's spouse lives with him, and he maintains regular in-person and telephonic contact with his stepchildren in Israel.

The record is devoid of substantive background information on Applicant's spouse and stepchildren. Significantly, there is no information with respect to their Israeli military service, including dates of service, rank, division in which they served, or military training and specialty. Additionally, the record does not show their work history, education, current employment, or documentary evidence of U.S. permanent residence applications and their current status.

Applicant asserts that he and his family are law-abiding citizens, and they do not belong to any special interest group or organization that may conflict with his personal or professional life. He stresses that he is a loyal U.S. citizen and employee, and will always reside primarily in the United States. He notes that his colleagues can vouch for him, but did not include any documentary evidence of character or employment performance.[10]

I note that 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. Israel is a close ally of the United States, and the United States is its largest trading partner. Israel has been identified as a major practitioner of industrial espionage against U.S. companies. There have been instances

[5] Item 3.

[6] AE B.

[7] No documentary evidence was submitted establishing the value of the home.

[8] AE B.

[9] Item 3; AE B.

[10] AE B. Applicant did not provide character letters or other documentary evidence supporting his assertions.

of illegal export, or attempted illegal export, of U.S. restricted, dual-use technology to Israel. Israel has become a major global leader in arms exports, and the United States and Israel have periodically disagreed over Israeli sales of sensitive U.S. and Israeli technologies to third-party countries, including India, China and Russia.

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 the state of Israel's creation in 1948. 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 in Israel are advised to be cautious.

Israel considers U.S. citizens who also hold Israeli citizenship or have a claim to dual nationality to be Israeli citizens for immigration and other legal purposes. U.S. citizens visiting Israel have been subjected to prolonged questioning and thorough searches by Israeli authorities upon entry or departure.

Policies

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

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and 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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "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 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 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).

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

Applicant's spouse is a citizen of Israel (SOR ¶ 1.a), but currently lives with Applicant in Taiwan. Applicant's stepdaughter and two stepsons are citizens and residents of Israel (SOR ¶ 1.b and c). His mother-in-law has passed away (SOR ¶ 1.d). Applicant's spouse owns a home in Israel, where they resided while he was assigned to Israel (SOR ¶ 1.e). His spouse and stepchildren served in the Israeli military. The security concern under this guideline is set out in AG ¶ 6 as follows:

> Foreign contacts and interests may be a [trustworthiness] 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.

Applicant's connections to Israel raise three disqualifying conditions under this guideline:

> AG ¶ 7(a): 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(b): connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information; and
>
> AG ¶ 7(e): a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation.

AG ¶¶ 7(a) and 7(e) require 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 or financial interests subject to a foreign government. 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).

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, "even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security." ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. ar. 29, 2002).

Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. Nevertheless, 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).

The Israeli citizenship of Applicant's spouse and stepchildren, some of whom reside in Israel, coupled with their connection to the Israeli military, albeit mandatory service, are sufficient to establish the "heightened risk" in AG ¶ 7(a) and raise the potential conflict of interest in AG ¶ 7(b). His spouse's ownership of property that Applicant resided in while living in Israel, and that is currently occupied by one or more of his stepchildren, is sufficient to raise AG ¶ 7(e).

The following mitigating conditions under this guideline are potentially relevant:

> AG ¶ 8(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;
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> AG ¶ 8(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;
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> AG ¶ 8(c): 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; and
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> AG ¶ 8(f): the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

AG ¶ 8(a) is not established. Four members of Applicant's immediate family are citizens of Israel, three reside in Israel and they all have or had military connections to Israel. Applicant's spouse also owns property in Israel that is occupied by her children. These family ties, coupled with Israel's record of industrial espionage, preclude a finding that it is unlikely that Applicant 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 United States.

AG ¶ 8(b) is not established. In terms of allegiance, Applicant has one foot in the United States and one foot in Israel. While he has strong ties to the United States and has held longstanding employment and a security clearance, he also has strong ties to

Israel through his marriage to an Israeli citizen with children and grandchildren who are residents and citizens of Israel. Without additional facts that were not contained in the record, I am not convinced that he would resolve any conflict of interest in favor of U.S. interests.

AG ¶ 8(c) is not established. Applicant has frequent contact with his spouse, stepchildren and presumably his grandchildren. He has not overcome the rebuttable presumption that contacts with an immediate family member in a foreign country are not casual. ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002).

AG ¶ 8(f) is not established. Applicant's spouse owns property in Israel, presumably worth $120,000, that they occupied together while assigned to Israel, and is now occupied by some or all of his stepchildren. Despite his claim to have no interest in the property, his past use of the home and current use by his family show an indirect interest not reflected in the title. Although there is no evidence that the Israeli government uses the financial assets of its citizens as leverage to gain industrial and proprietary information, his indirect interest in the home used by his family members has the potential to result in a conflict of interest.

Whole-Person Concept

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. In applying 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 relevant 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.

I have incorporated my comments under Guideline B in my whole-person analysis. The record is devoid of material facts about Applicant's spouse and stepchildren that may resolve security concerns raised in the SOR. Based on the information available, I find Applicant's divided loyalties and foreign financial interests preclude a finding that he can be expected to resolve any conflict of interest in favor of the United States. After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on his vulnerability to foreign influence.

Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant or 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 B:	Against Applicant
Subparagraphs 1.a – 1.c, and 1.e:	Against Applicant
Subparagraph 1.d:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Gregg A. Cervi
Administrative Judge