



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



In the matter of:

Applicant for Security Clearance

)
)
)
)
)

ISCR Case No. 15-06419

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

03/27/2017

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Statement of the Case

On March 4, 2016, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing concerns under Guideline B (Foreign Influence) regarding his eligibility for a security clearance.¹ In a letter dated March 30, 2016, Applicant admitted the sole allegation raised under Guideline B and requested a hearing. I was assigned the case on August 16, 2016. On September 8, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice setting the hearing for September 27, 2016. It was convened as scheduled.

The Government offered four documents, which were accepted into the record without objection as exhibits (Exs.) 1-4, including a request for administrative notice concerning certain facts related to the State of Israel (Israel). Applicant gave testimony and offered 13 documents, accepted into the record as Exs. A-M. The transcript of the proceeding (Tr.) was received on October 5, 2016, and the record was closed. Based

¹The 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 adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

on a thorough review of the case file, I find that Applicant carried his burden in mitigating security concerns arising under Guideline B.

Procedural and Evidentiary Rulings

The Government sought administrative notice with regard to certain information regarding Israel. (Ex. 3) After reviewing the documents submitted, as well as official documents issued by the United States State Department concerning the country at issue, I take administrative notice of the following facts:

Israel is a parliamentary democracy of about 7.71 million people with a modern economy with ongoing regional security concerns. Despite the instability and armed conflict that have marked Israel's relations within the region since it came into existence, Israel has developed a diversified, technologically advanced market economy focused on high-technology electronic and biomedical equipment, chemicals, and transport equipment. Israel occupied the West Bank, Gaza Strip, Golan Heights, and East Jerusalem as a result of the 1967 war. In 1994, the Palestinian Authority was established in the Gaza Strip and West Bank, although the Islamic Resistance Movement (HAMAS), a U.S. designated foreign terrorist organization (FTO), took control of the Gaza Strip in June 2007. Terrorist attacks are a continuing threat in Israel, and may be directed at American interests. The U. S. State Department advises U.S. citizens to take due precautions when traveling to the West Bank, Gaza, and Israel. U.S. citizens, including tourists, students, residents, and U.S. government.

The relationship between Israel and the United States is friendly and yet complex. Since 1948, the United States and Israel have a close friendship based on common democratic values, religious affinities, and security interests. The Government notes that United States-Israeli defense, diplomatic, and economic cooperation has been close for decades. U.S. 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. Arms sales, information sharing, and co-development of technology between the United States and Israel raises questions about what Israel might do with the capabilities it acquires. To minimize any such concerns, the United States enacted the Arms Export Control Act (AECA) which specifically enumerates the purposes for which foreign governments can use U.S. military articles and limits their ability to transfer the products to third-parties without prior consent of the U.S. President.

The Government also cites to the 1986 case of Jonathan Pollard, who pled guilty to selling classified information to Israel; the 2005 Lawrence Franklin case, where the individual pled guilty to disclosing classified information to an Israeli diplomat and two lobbyists; and a 2011 case where a U.S. Government scientist pled guilty to attempted espionage, believing he was providing classified information to an Israeli information officer. (Ex. 3, Request for Administrative Notice. at 5) In addition, the Government cites to five source documents, ranging from 2015 materials from the Congressional Research Service, the U.S. Department of Justice, and the U.S. Department of

Commerce; a 2014 document from the U.S. Department of State concerning travel information; and a 2006 Office of National Counterintelligence Executive Annual Report.

Concerning the Government's request that I take administrative notice of the fact that Israeli military officers have been implicated in collecting or attempting to collect protected technology from the United States, the incident reported in the Intelligence Threat Handbook occurred in 1986. Like the Jonathan Pollard case, that information must be evaluated in light of its dated nature. 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.

Findings of Fact

Applicant is a 63-year-old systems engineer who has worked for his present employer for just under two years. Applicant has earned a master's degree in computer engineering and a master's degree in communications. He is married and has two grown children, both of whom are settled into professional careers. Applicant's father served in World War II, his uncle was with a major U.S. metropolitan police department, and a cousin was a vetted U.S. Presidential appointee. (SOR Response) Applicant is highly valued at work and has received excellent performance ratings.

Both Applicant and his spouse were born and raised in the United States, solely as United States citizens. Applicant's wife's sister, however, married a man with Israeli citizenship. That couple had two sons, now in their mid- to late-20s and now at issue. Applicant's sister-in-law and her husband divorced. The husband returned to Israel, where he worked in retail sales.² (Tr. 56) Although Applicant's wife's nephews were born in the United States, it was decided that they should spend time in Israel to better know their father's family. It was also decided they take advantage of the government-paid opportunities available those of college and military age. (SOR Response)

To that end, one of Applicant's wife's nephews completed his undergraduate degree and the other graduated from high school. Then, the two young men were moved to Israel. They became dual United States-Israeli citizens.³ Ultimately, they completed compulsory military service in the Israeli Defense Forces (IDF).⁴ Neither had a security clearance during his service. As a result of that service, the elder man became a medical doctor and his younger brother earned a bachelor's degree in government, with their tuition significantly subsidized by the Israeli government. As required by Israeli law, both of these men are now considered to be members of the IDF reserves. (Tr. 56)

² Applicant has no contact with this individual or anyone else in Israel. (Tr. 61)

³ Tr. 52.

⁴ The elder man served for three years and reached the rank of sergeant, while the younger man completed his service after six months at the rank of private. (Tr. 42-43)

Applicant's wife's elder nephew with the medical degree returned to the United States about two years ago. He is completing a four-year medical residency in a specialized field at this time. He is married to a United States citizen, a former high school sweetheart, and they have an infant child. He has reestablished full-time residency in the United States. (Tr. 71) It is commonly believed that he and his family intend to stay in the United States permanently.

Applicant's sister-in-law's youngest son, who earned a bachelor's degree in Israel, continued in Israel for one year after leaving the IDF to work as an intelligence specialist for a private sector entity.⁵ (Tr. 53) The young man had no government clients in his work and he did not need a security clearance. (Tr. 53-54) He has since moved on to another private entity, working in Asia.⁶ (Tr. 53) He prepares reports based on open-source information from the Internet. (Tr. 73) At one point, he was active teaching Arab youth while promoting a more inclusive, progressive narrative for the Israeli-Arab people in a scholastic setting. (Tr. 72)

This young man is single, and has no children. Within their family, there is "some talk that [he] might want to be coming back to the States" to settle down. (Tr. 65) Applicant's wife, however, is not sure as she has little contact with the man and her discussion with her sister about her nephews appears limited. Applicant has seen both of his wife's nephews once in the past year, at extended family gatherings. Applicant's only electronic communication with them has been to get information for this process. (Tr. 59) He does not see them that often, maybe once a year or less. (Tr. 58-59)

Applicant is proud to be an American citizen. He is active in his community and won an award for his volunteer service for his local fire department. His wife is the daughter of a World War II veteran. She volunteers in the community when she is not busy with her respected domestic-violence counseling career. The couple's home, investments, careers, and children are in the United States. Applicant is looking forward to retirement and being a fully engaged grandparent.

Applicant visited Israel about 17 years ago. He has not had an active passport since 2004 and he has not been abroad since the Israel trip. Applicant's wife visited Israel in 2000. Applicant is proud of his family and its long dedication to life in the United States for over a century. He commented, "My wife and I have always talked about how we won the lottery in life being born U.S. citizens at this time in history. We're so fortunate to be able to provide good, meaningful, and happy lives for ourselves and our children." (Tr. 76)

⁵ Applicant knew little about this young man. He had to specifically research in order to find sufficient information in order to answer questions posed during this process. (Tr. 72)

⁶ The entity provides "sort of executive protection for companies but they draw their intelligence from lots of different areas as these executives travel elsewhere. So its not paramilitary but . . . sort of bodyguard-like. . . ." (Tr. 69)

Applicant's wife is not close to her nephews and only knows of their activities through conversations with her sister and family. (Tr. 64) She has infrequent contact with her nephews. She is unsure about where her youngest nephew resides or what military rank he attained (Tr. 28-29)

From his workplace, Applicant's manager testified favorably on his behalf. A long-time friend testified that Applicant is of high character, reliable, loyal, and honest. (Tr. 36) Applicant's references write of Applicant in highly favorable terms. (Exs. B-G)

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 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, these guidelines are applied 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(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." All available, reliable information must be considered in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and 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.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the

applicant concerned.” See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline B, Foreign Influence

The nephews at issue are not Applicant’s nephews. They are Applicant’s wife’s nephews. Applicant only sees them as, at best, extended family. The nephews are dual citizens of the United States and Israel that served in the IDF. One was an intelligence analyst for a private entity in Israel, but now works for a company based in Asia. The concern under AG ¶ 6 is applicable:

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.

Two disqualifying conditions under this guideline are relevant:

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; and

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.

As a threshold issue, the evidence reflects that interests within Israel have been shown to use United States citizens to obtain protected information. Consequently, on its face, there is a risk that Applicant could be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or be vulnerable to pressure or coercion by any foreign interest. Such evidence demands that the facts be examined in terms of a “heightened risk.” Here, Applicant’s wife’s sister’s two sons are dual-citizens of the United States and Israel and once served in the IDF. In addition, one of the young men works in the area of intelligence gathering, albeit within the private sector. These facts raise the above-referenced disqualifying conditions.

Accordingly, Applicant's mitigation case must be examined through the lens of heightened scrutiny.

In meeting this higher standard of proof and persuasion, an applicant is not required to sever all ties with a foreign country before he can be eligible for a security clearance. What factor or combination of factors will mitigate concerns raised by an applicant with family members in a foreign country, however, is not easily identifiable or quantifiable. An administrative judge's predictive judgment in these types of cases must be guided by a commonsense assessment of the evidence and consideration of the adjudicative guidelines, as well as the whole-person factors set forth in the Directive. A judge's ultimate determination must also take into account the overarching standard in these cases, namely, that any doubt raised by an applicant's circumstances must be resolved in favor of the national interest.

The following mitigating conditions are potentially relevant in this matter:

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;

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; and

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.

The country at issue is Israel. Applicant's wife has two nephews of dual U.S.-Israeli citizenship. The men at issue are in their 20's. Facts have changed since the SOR was issued. At present, the elder young man now lives in the United States, has married a former girlfriend from his high school days in the United States, is working on a medical residency, and recently became a father. Applicant and his wife have the understanding that this man and his family will remain in the United States.

The younger man at issue has not returned to the United States, although family scuttlebutt is that the young man intends to do so in the near future. At present, he is working for a private sector intelligence gathering entity, where he culls information from open-source sites on the Internet for a personal protection service. He is working for an entity in or based in Asia. Where he presently lives full-time seems unclear because neither Applicant nor his wife keep in contact with these men, and Applicant's wife and her sibling, while sisterly, do not appear to discuss their grown children in detail.

Neither young man at issue is still in the IDF. Both have moved on to their own professional careers. Neither young man has a present nexus to the government of Israel, although by law, their IDF service attributes to them reservist status after discharge. There is no evidence this status has been activated or elevated since their compulsory service was completed. Their present careers, lives, and gravitation away from Israel make the likelihood of their returning to the IDF appear less likely.

Communication between Applicant and his wife and the two men is highly limited. Indeed, both Applicant and his wife had to make specific inquiries to, and about the men in order to answer questions about them with some degree of accuracy. They do not otherwise maintain regular contact with them. While they have seen both men in the past year, their interaction at large, extended family events is usually infrequent.

Meanwhile, Applicant and his wife are both proud to be Americans and the children of United States veterans of World War II. Applicant is particularly proud of his family members' parts in maintaining the United States' safety and stability for over a century, and of his own volunteer efforts with the fire department. Both Applicant and his wife have established careers in the United States. Their home, friends, activities, savings, investments, and, most significantly, their grown children and growing grandchildren are in the United States. Applicant was highly credible in stating his complete loyalty to the United States. He is well regarded by work peers and friends. While Applicant and his wife care for their extended family members, the relationships now at issue are not as deep as the couple's relationships to their family, friends, and lives in the United States. I find AG ¶ 8(a) through AG ¶ 8(c) apply.

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(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress;
- and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I considered all of the

potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Specifically, I considered those findings of facts and described above that are relevant in light of the AG ¶ 2(a) adjudicative factors. I have also considered them in light of AG ¶ 2(c) and the Guideline B considerations. With regard to the relationship between Applicant and his wife to the son's of Applicant's wife's sister is the fact they had to research and inquire in order to relate details about the young men in question. Combined with the facts that they do not maintain regular correspondence and have only had recent interaction through a gather of extended family is telling. Their relationship, while familial and warm, does not appear to be close or intimate.

The two young men at issue served in the IDF and, consequently, are considered IDF reservists. Whether they would be likely to honor that service cannot be predicted. Given the fact one has moved back to the United States, married a woman from the United States, started his medical career, and recently sired a child, indicates an intent to settle in the United States. This conclusion is apparently shared by Applicant, his wife, and her family. The other young man has moved into the private sector, works in the private sector in a capacity related to an Asian entity, and appears to be gravitating back to the United States, as well. Given all these facts, I find it unlikely that Applicant would be compromised over secure information by these relatively remote relations. Overall, the record leaves me without questions about Applicant's security clearance eligibility.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline B:	FOR APPLICANT
Subparagraph 1.a:	For Applicant

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 a security clearance. Eligibility for access to classified information is granted.

Arthur E. Marshall, Jr.
Administrative Judge