DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 15-07792
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*

07/14/2017

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department's intent to deny her eligibility for access to classified information. Applicant mitigated the concerns about foreign preference and foreign influence. Eligibility is granted.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on October 1, 2015. This document is commonly known as a security clearance application. On May 12, 2016, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant his eligibility for access to classified information.[1] The SOR is similar to a complaint

[1] This action was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review* Program (January 2, 1992), as amended (Directive). In addition, Security Executive Agent Directive (SEAD) 4, *National Security Adjudication Guidelines* (AG), effective within the Defense Department on June 8, 2017, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2016). In this case, the SOR was issued under Adjudicative Guidelines effective within the Defense Department on September 1, 2006.

in a civil court case. It detailed the factual reasons for the action under the security guidelines known as Guideline B for foreign influence and Guideline C for foreign preference. Applicant answered the SOR on June 20, 2016, and requested a decision based on the written record without a hearing.

On August 5, 2016, Department Counsel submitted a file of relevant material (FORM).[2] The FORM was mailed to Applicant on August 10, 2016. She was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. Applicant received the FORM on September 1, 2016.[3] Applicant did not respond to the FORM. The case was assigned to me on June 1, 2017. Because new Adjudicative Guidelines became effective on June 8, 2017, I reopened the record *sua sponte* via email to the parties on June 29, 2017, until close of business July 13, 2017. On July 12, 2017, Applicant emailed a reply advising that she had nothing to add to her original answer to the SOR. That email reply is marked as Applicant's Exhibit A.

Procedural Matters

Included in the FORM were four items of evidence, three of which are marked as Government Exhibits 1 through 3.[4] Exhibit 2 is a report of investigation (ROI) summarizing Applicant's interview that took place during the June 2015 background investigation. The ROI is not authenticated, as required under ¶ E3.1.20 of the Directive.[5] Department Counsel's written brief includes a footnote advising Applicant that the summary was not authenticated and that failure to object may constitute a waiver of the authentication requirement. Nevertheless, I am not persuaded that a *pro se* applicant's failure to respond to the FORM, which response is optional, equates to a knowing and voluntary waiver of the authentication requirement. The record does not demonstrate that Applicant understood the concepts of authentication, waiver, and admissibility. It also does not demonstrate that he understood the implications of waiving an objection to the admissibility of the ROI. Accordingly, Exhibit 2 is inadmissible, and I have not considered the information in the ROI.

[2] The file of relevant material consists of Department Counsel's written brief and supporting documentation, some of which are identified as evidentiary exhibits in this decision.

[3] The Defense Office of Hearings and Appeals' (DOHA) transmittal letter is dated August 10, 2016, and Applicant's receipt is dated September 1, 2016. The DOHA transmittal letter informed Applicant that she had 30 days after receiving it to submit information.

[4] The first item in the FORM is the SOR and Applicant's Answer. Because the SOR and the Answer are the pleadings in this case, they are not marked as Exhibits. Items 2 through 4 are marked as Exhibits 1 through 3.

[5] *See generally* ISCR Case No. 12-10933 (App. Bd. Jun. 29, 2016) (In a concurring opinion, Judge Ra'anan notes the historical concern about reports of investigation in that they were considered by some to present a heightened problem in providing due process in security clearance cases. Judge Ra'anan raises a number of pertinent questions about using an unauthenticated ROI in a non-hearing case with a *pro se* applicant.).

Findings of Fact

Applicant is 57 years old and was born in Israel to parents who were, and remain, Israeli citizens. She fulfilled her mandatory military service in Israel by serving from March 1979 until August 1980 in the Israeli Air Force. She arrived in the United States in 1989 and was naturalized in 1996. She is divorced and remarried in 1991. Her current spouse is a native-born United States citizen. Since 2011, she and her spouse have lived in a home in the United States that they own. She has no children. Since September 2008, she has been employed in the United States maritime industry.[6] Her security clearance sponsor is a defense contractor.

Under Guideline C, the SOR alleged that (1) Applicant possesses a currently valid Israeli passport that she used to travel to Israel as recently as May 2015, and (2) she voted in Israeli elections. Under Guideline B, the SOR alleged that (1) Applicant's parents are citizens and residents of Israel, (2) Applicant's two sisters are citizens and residents of Israel, and (3) Applicant maintains close contact with several friends who are citizens and residents of Israel. Applicant reported her possession and use of her Israeli passport in her security clearance application. At the time she completed her security clearance application, she had a valid United States passport.[7]

Applicant admitted the SOR allegations with explanations. Applicant stated that aside from her family ties to Israel, she has no interests in Israel, no bank accounts, or property, and has never worked there. She only voted once in Israel, at her family's request, and only because she happened to be in Israel on election day. She has dual citizenship, because she was born in Israel. She is not willing to renounce that citizenship, because her parents are Holocaust survivors, for whom Israel was their salvation. She has had a successful sea-going career as an officer on American-flagged vessels, a United States Government research vessel, and is currently serving on commercial vessels of the United States Merchant Marine.[8]

The record shows that Applicant has no financial interests, no business, professional activities, or government contacts, and no business ventures in Israel. Applicant visited Israel in March 2014 and in May 2015, and she used her Israeli passport. She communicates with her family in Israel via telephone about once a week. Applicant's mother is 88 years old, and her father is 95 years old. Neither her parents nor her two sisters have, or have had, any affiliations with the Israeli government, military, security, defense industry, or intelligence services.[9]

[6] Exhibit 1.

[7] Exhibit 1.

[8] Answer.

[9] Answer and Exhibit 1.

Administrative Notice (Israel)

In response to the Government's request, to which Applicant did not object, I have taken administrative notice of the following relevant facts about the country of Israel:

Israel is a parliamentary democracy with strong historic and cultural ties with the United States. Commitment to Israel's security has been a cornerstone of U.S. Middle East policy since Israel's inception. Both countries have a mutual interest in a peaceful, secure Middle East. On July 27, 2012, President Obama signed the United States-Israel Enhanced Security Cooperation Act. The goal of this legislation is to strengthen the military edge that Israel enjoys over its regional enemies.

Israel aggressively targets sensitive U.S. technology. There have been some cases of U.S. government employees who have been prosecuted and convicted of spying against the U.S. for Israel. In 1998, Israel acknowledged that one of these individual's had been its agent.

The threat of terrorist attacks is growing in ungoverned or minimally governed areas near Israel's borders with Syria, Lebanon, the Sinai Peninsula, and Libya. However, some unconventional security threats have been reduced because of factors such as heightened security measures vis-a-vis Palestinians, missile defense systems, and cyberwarfare capabilities.

Law and Policies

It is well-established law that no one has a right to a security clearance.[10] As noted by the Supreme Court in *Department of the Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[11] Under *Egan*, E.O. 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.[12] An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.[13]

[10] *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

[11] 484 U.S. at 531.

[12] Directive, ¶ 3.2.

[13] Directive, ¶ 3.2.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[14] The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[15] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[16] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[17]

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.[18] The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[19]

Discussion

Guideline C – Foreign Preference

Under AG C for foreign preference,[20] suitability of an applicant may be questioned or put into doubt because he or she acts in such a way as to indicate a preference for a foreign country over the United States:

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.

[14] ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

[15] Directive, Enclosure 3, ¶ E3.1.14.

[16] Directive, Enclosure 3, ¶ E3.1.15.

[17] Directive, Enclosure 3, ¶ E3.1.15.

[18] *Egan*, 484 U.S. at 531.

[19] ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

[20] AG ¶¶ 9, 10, and 11 (setting forth the concern and the disqualifying and mitigating conditions).

In analyzing the facts of this case, I considered the following potentially disqualifying and mitigating conditions:

> AG ¶ 10(a) applying for and/or acquiring citizenship in any other country;
>
> AG ¶ 10(b) failure to report, or fully disclose when required, to an appropriate security official, the possession of a passport or identity card issued by any country other than the United States;
>
> AG ¶ 10(c) failure to use a U.S. passport when entering or exiting the U.S.;
>
> AG ¶ 10(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; and,
>
> (2) otherwise acting to serve the interests of a foreign person, group, organization, or government in any way that conflicts with U.S. national security interests;
>
> AG ¶ 11(a) the foreign citizenship is not in conflict with U.S. national security interests;
>
> AG ¶ 11(b) the dual citizenship is based solely on parental citizenship or birth in a foreign country, and there is no evidence of foreign preference; and,
>
> AG ¶ 11(f) the foreign preference, if detected, involves a foreign country, entity, or association that poses a low national security risk.

The evidence shows that Applicant is an Israeli citizen by virtue of having been born in Israel to parents who were, and remain, Israeli citizens. Although that triggers a concern under AG ¶ 10(a), that concern is partially mitigated under AG ¶ 11(b). Full mitigation depends, however, on whether there is "no evidence of foreign preference."

The evidence also shows that Applicant traveled to Israel from the United States in March 2014 and in May 2015, using her Israeli passport. Under the 2006 Guidance C AG ¶ 10(c), Applicant's mere possession of a current Israeli passport would have established a disqualifying factor, thereby creating a foreign preference. Under the 2017 Guideline C AG ¶ 10(b), however, mere possession of a foreign passport is not a disqualifying factor, as long as an applicant "report[s], or fully disclose[s] when required, to an appropriate security official, the possession of a [foreign] passport." AG ¶ 10(b) does not specifically identify when such disclosure is "required" or who may be "an appropriate security official." I conclude that Applicant's security clearance application required her to disclose any current foreign passports, which she did by disclosing her current Israeli

passport. I further conclude that the Office of Personnel Management investigator assigned to Applicant's case was, under these circumstances, "an appropriate security official." Therefore, AG ¶ 10(b) does not raise a foreign preference.

That does not, however, end the inquiry. AG ¶ 10(c) raises a foreign preference if an applicant "fail[s] to use a U.S. passport when entering or exiting the U.S." In this case, Applicant identified Israel in response to the security clearance application question "to which countries [she] traveled" using her Israeli passport. That response sheds no light on whether Applicant failed to use her United States passport in exiting or entering the United States on her trips to Israel. Neither is the SOR of any help here, as it alleges only that Applicant used her Israeli passport to travel to Israel (which Applicant admitted). Therefore, the record is silent on whether Applicant failed to use her United States passport in exiting or entering the United States in her travels to Israel. As such, I must conclude that there is no foreign preference established under AG ¶ 10(c). This is a long-winded (but I believe necessary) way of concluding that any concern under AG ¶ 10(a) is fully mitigated under AG ¶ 11(b).

The evidence shows that Applicant voted in Israeli elections. Under the 2006 AG ¶ 10(a)(7), voting in a foreign election was an expressly articulated disqualifying factor. Not so in the revised Guideline C. The only roughly comparable disqualifying factor is AG ¶ 10(d). AG ¶ 10(d) addresses "participation in foreign activities, including but not limited to" and then lists certain activities, none of which specifically identify voting as raising a security concern. On the one hand, one can argue that although voting is not expressly called out, there is no more fundamental a "participation in foreign activities" than casting a vote in another country's election. On the other hand, one can argue that when the drafters of the Adjudicative Guidelines wanted to make voting in a foreign election a disqualifying factor, they did so expressly in the 2006 AG ¶ 10(a)(7). They did not, however, do so in the 2017 Guideline C. I conclude that the "including but not limited to" language in the current AG ¶ 10(d) is not meant to impliedly include voting in a foreign country's election. Therefore, there is no security concern by reason of Applicant voting in Israeli elections.[21]

Given the long-standing alliance between the United States and Israel and their mutual interest in a peaceful and secure Middle East, I find that Applicant's Israeli citizenship is not in conflict with United States security interests. Mitigating factors AG ¶¶ 11(a) and (b) apply.

[21] Because AG ¶ 10(a)(7) of the 2006 Guidelines expressly made voting in a foreign election a disqualifying condition, arguably the result here could have been different under those Guidelines. This singular incident, however, based on all the surrounding circumstances, would be outweighed by the favorable record evidence as a whole. Thus, I would have concluded SOR ¶ 1.b in Applicant's favor, even if I used the 2006 version of Guideline C.

Guideline B – Foreign Influence

Under AG B for foreign influence,[22] suitability of an applicant may be questioned or put into doubt, because he or she has foreign contacts and interests, including but not limited to, business, financial, and property interests, that may result in divided allegiance:

> 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 maybe 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.

In analyzing the facts of this case, I considered the following potentially disqualifying and mitigating conditions:

> AG ¶ 7(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,
>
> 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 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; and,
>
> AG ¶ 8(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities 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, organizations, or government and the interests of the United States; and,

[22] AG ¶¶ 6, 7, and 8 (setting forth the concern and the disqualifying and mitigating conditions).

> AG ¶ 8(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, or allegiance to the group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest.

The mere existence of close family ties with family members is not, as a matter of law, disqualifying under Guideline B. If an applicant, however, has close relationships with relatives living in a foreign country, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information.

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 or inducement. 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, the country is known to conduct intelligence collection operations against the United States, or the foreign country is associated with a risk of terrorism. The relationship between Israel and the United States places a significant, but not insurmountable burden of persuasion on Applicant to demonstrate that her relationships with her relatives living in Israel do not pose a security risk. Applicant should not be placed in a position where she might be forced to choose between loyalty to the United States and a desire to assist her relatives living in Israel who might be coerced by governmental entities.

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."[23] 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. Finally, we also know that friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields.

While there is no evidence that intelligence operatives from Israel seek or have sought classified or economic information from or through Applicant, or her relatives living in Israel, it is not possible to rule out such a possibility in the future. The Government produced substantial evidence to raise the issue of potential foreign influence.

AG ¶¶ 7(a) and 7(b) apply because of Applicant's relationships with her relatives who live in Israel. Applicant communicates with her Israeli relatives by telephone on a weekly basis. There is a rebuttable presumption that a person has ties of affection for, or obligations to, their immediate family members. Applicant has not attempted to rebut this

[23] ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

presumption. Given the Israeli intelligence approach toward the United States, Applicant's relationships with her relatives living in that country are sufficient to create "a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.

The next inquiry is whether mitigating conditions in AG ¶¶ 8(a) or 8(b) apply. AG ¶ 8(a) partially applies. Applicant's parents and siblings are not in government positions and do not have, or have not had, affiliations with the Israeli government.[24] Therefore, it is unlikely that Applicant would be placed in a position of having to choose between her Israeli relatives and those of the United States.

Applicant has met her burden to establish his "deep and longstanding relationships and loyalties in the U.S." Applicant has lived in the United States since 1989 and has been a naturalized United States citizen since 1996. She has been married to a native-born United States citizen since 1991. She and her husband have owned a home here since 2011. The evidence supports that Applicant has longstanding ties to the United States and would resolve any conflict of interest in favor of the United States. AG ¶ 8(b) applies.

Conclusion

The record does not create doubts about Applicant's reliability, trustworthiness, judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.[25] Accordingly, I conclude that Applicant met her ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant her eligibility for access to classified information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the SOR allegations:

Paragraph 1, Guideline C:	For Applicant
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline B	For Applicant
Subparagraphs 2.a-d:	For Applicant

[24] I discounted Applicant's service in the Israeli Air Force, because it was compulsory and occurred almost 40 years ago.

[25] AG ¶¶ 2(d)(1)-(9) and 2(f)(1)-(6).

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant access to classified information.

Philip J. Katauskas
Administrative Judge