DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 17-03623
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: Allison R. Weber, Esq.

07/27/2018

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines B (Foreign Influence) and C (Foreign Preference) by Applicant's Israeli citizenship and ties to Israel. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on May 29, 2015, seeking to continue a security clearance he has held since October 2003. On November 15, 2017, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines B and C. The DOD acted under Executive Order (Exec. Or.) 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), for all adjudicative decisions on or after June 8, 2017.

Applicant answered the SOR on December 22, 2017, and requested a decision on the record without a hearing. Department Counsel submitted the Government's written case on January 18, 2018. On January 22, 2018, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on February 3, 2018, and submitted Applicant's Exhibit (AX) A, which was admitted without objection. The case was assigned to an administrative judge on April 12, 2018, and reassigned to me on July 18, 2018, because of workload.

Evidentiary Issue

The FORM included Item 7, a summary of an interview by a security investigator in January 2017. The summary was not authenticated as required by Directive ¶ E3.1.20. Department Counsel informed Applicant that he was entitled to comment on the accuracy of the summary; make any corrections, additions, deletions or updates; or object to consideration of the summary on the ground that it was not authenticated. Applicant submitted a detailed response to the FORM but did not comment on the accuracy or completeness of the summary, nor did he object to it. Although *pro se* applicants are not expected to act like lawyers, they are expected to take timely and reasonable steps to protect their rights under the Directive. ISCR Case No. 12-10810 at 2 (App. Bd. Jul. 12, 2016). I conclude that Applicant waived any objections to the summary of his January 2017 interview.

Administrative Notice

Department Counsel requested that I take administrative notice of relevant facts about Israel. (FORM Item 8.). I took administrative notice as requested. Because the documents submitted by Department Counsel focused on the adverse information about Israel but provided minimal favorable information about the overall relationship between the United States and Israel, I took administrative notice *sua sponte* of the facts set out in the U.S. Department of State fact sheet, *U.S. Relations with Israel,* May 14, 2018, which is attached to the record as Hearing Exhibit (HX) I. I notified Department Counsel of my intention to take administrative notice of the facts recited in HX I, and she did not object. (HX II.) The facts administratively noticed are set out below in my findings of fact.

Findings of Fact[1]

In Applicant's answer to the SOR (Answer), he admitted all the allegations with explanations. His admissions are incorporated in my findings of fact.

[1] Applicant's personal information is extracted from his security clearance application (FORM Item 5) unless otherwise indicated by a parenthetical citation to the record.

Applicant is a 78-year-old information technology specialist employed by federal contractors since September 2003. Although his employer, a management consulting company, holds contracts with the DOD, Applicant works on a contract supporting another government agency whose mission is to conduct humanitarian projects related to economic growth, education, and the environment in foreign countries. He is a software designer and systems analyst. His work involves strategy, planning, and training for the agency's humanitarian mission and includes technical advice on the agency's internal practices such as the management of official-business travel. (Answer at 42.) His work is sensitive, but he does not handle classified information. However, a security clearance is a condition of his employment. (Answer to SOR at 36; AX A.)

Applicant and his wife are native-born U.S. citizens. They married in August 1968 and have a 45-year-old son, a native-born U.S. citizen residing in the United States. Applicant holds bachelor's and master's degrees in mathematics and a doctorate in anthropology.

Applicant and his wife resided in the United States until they moved to Israel in 1982. They became Israeli citizens in 1985 under the Israeli "Law of Return,"[2] but they retained their U.S. citizenship. Between 1982 and 1988, Applicant worked for two Israeli companies that held defense contracts as well as commercial contracts. In his first job, his employer held defense contracts, but he worked only on automated bakery software. In his second job he worked on optical technology ("smart" eyeglasses containing miniature computers). This employer collaborated extensively with the U.S. military, and the optical technology was eventually provided by Israel to the United States Air Force.

Applicant and his wife moved back to the United States in 1988, and from 1988 to 2003, he worked as a software engineer for several non-government, private-sector companies in the United States. In late 2008, he and his wife moved back to Israel, where they now reside. They visit the United States at least twice a year for a month or two each time. (FORM Item 4 at 37.) Applicant teleworks from his home in Israel but travels frequently to the United States in connection with his work. He and his wife owned a home in the United States until they sold it in June 2015. They still own a 42-acre property in the United States. (AX A.)

Applicant's wife is in poor health. She was hospitalized at the time the SOR was issued, and Applicant was unwilling to travel to the United States for an in-person hearing at that time. His wife is still in poor health, but is receiving medical care at home in Israel. Applicant has adhered to his decision to forego an in-person hearing in the hope that a hearing on the record will expedite a decision. He has been suspended from his job since the SOR was issued. The administrative correspondence regarding his decision to forego an in-person hearing is attached to the record as HX III.

Applicant and his wife own a home in Israel, which is worth about $421,000 in U.S. dollars. Because they reside in Israel, they have made and maintained Israeli friends, including a retired software engineer, previously employed by an Israeli

[2] The "Law of Return" allows all Jews to immigrate to Israel and obtain Israeli citizenship.

aerospace company, who retired about six months before Applicant received the SOR. The friend has no current connection to Israeli defense contractors, Israeli intelligence, or the Israeli government. (FORM Item 4 at 38.)

Applicant and his wife live in Israel because of their religious attachment to the country. They have not decided whether they will remain in Israel or move back to the United States. (FORM Item 4 at 39.) When Applicant was interviewed by a security investigator in January 2017, he told the investigator that if he came to a "crossroads" between the requirement that he hold a security clearance and his unwillingness to renounce his Israeli citizenship, he would retire from his U.S. employment and live in Israel. (FORM Item 7 at 2.)

Applicant's salary is deposited directly into a U.S. bank. He has a credit card issued by the same bank. He maintains a bank account in an Israeli bank, in which he maintains a balance of about $3,000 (U.S.) for living expenses. (FORM Item 4 at 38.)

As a citizen of Israel, Applicant was required to serve in the Israeli Defense Forces. He never served on full-time active duty, but he served as a reservist, trained in disaster relief, from 1983 to 1988, when he was "aged out." (FORM Item 4 at 38.)

In August 2008, Applicant obtained an Israeli passport. (FORM Item 7 at 1.) He also exercised his Israeli citizenship by voting in Israeli elections in January 2013. (FORM Item 7 at 2, 5.) Neither circumstance is alleged in the SOR.

Applicant's performance review for the period ending in December 2015 rated him as "excellent" in all performance categories and recommended that he receive a bonus. (Answer at 42.) Appended to his Answer are numerous testimonials from colleagues and friends who all describe him as trustworthy, ethical talented, compassionate, and loyal to the United States. A retired U.S. foreign service officer who has known Applicant for 35 years describes him as "an individual of the highest moral character and ethical practices," who is "at heart an American citizen who has Israeli citizenship, not [vice] versa." (Answer at 44.) A co-worker who has known Applicant for 11 years describes him as "a trustworthy and loyal American citizen and a highly valued professional colleague." (Answer at 46.)

Israel is a parliamentary democracy. The United States was the first country to recognize Israel as a state in 1948, and the first to recognize Jerusalem as the capital of Israel in 2017. Israel is regarded as the United States' most reliable strategic partner in the Middle East. The United States 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. The United States is Israel's largest single trading partner. (HX I.)

Israel has been identified as a major practitioner of industrial espionage against U.S. companies. There have been numerous instances of illegal export, or attempted

illegal export, of U.S. restricted, dual-use technology to Israel and instances of Israeli sales of sensitive U.S. and Israeli technologies to third-party countries. (FORM Item 8.)

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. (FORM Item 8.)

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. Dual U.S.-Israeli citizens must enter and depart Israel using Israeli passports. (FORM Item 8.)

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 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. 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." 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. 15-01253 at 3 (App. Bd. Apr.20, 2016).

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.

Analysis

Guideline B, Foreign Influence

The SOR alleges that Applicant and his spouse are dual citizens of the United States and Israel who live in Israel for part of each year (SOR ¶ 1.a); that they have friends who are citizens and residents of Israel, including one friend who is employed by an Israeli defense contractor (SOR ¶ 1.b); that they maintain a bank account in Israel with an balance of about $3,000 in U.S. dollars (SOR ¶ 1.c); and that they own a home in Israel worth at least $421,000 in U.S. dollars (SOR ¶ 1.d).

SOR ¶¶ 1.a, 1.c, and 1.d are established by Applicant's admissions. SOR ¶ 1.b is not fully established, because Applicant's friend is no longer employed by an Israeli defense contractor and has no current contacts with the Israeli government, intelligence agencies, or military services.

The security concern under this guideline 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 following potentially disqualifying conditions are relevant:

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;

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;

AG ¶ 7(e): shared living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion; and

AG ¶ 7(f): substantial business, financial, or property interests in a foreign country, or in any foreign owned or foreign-operated business that could subject the individual to a heightened risk of foreign influence or exploitation or personal conflict of interest.

AG ¶¶ 7(a), (e), and (f) all 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 living under a foreign government.

The evidence does not support a finding of "heightened risk" in this case. Israel is a friendly country, and Applicant has not been involved in high-technology, dual-use technology applicable to military equipment since he terminated his employment with an Israeli defense contractor in 1988. His current employer is not involved in the development, import, or export of military equipment or dual-use technology. He is a systems analyst who develops education and training programs for international humanitarian programs provided by the other government agency without a military component. There is no evidence that Israel threatens, abuses, or otherwise mistreats its citizens as a tool for industrial espionage.

The absence of a "heightened risk" also negates the likelihood of the conflict of interest contemplated by AG ¶ 7(b). Applicant is not involved in formulating U.S. military policy or planning. He is not involved in development of military or dual-use technology, military planning, or military intelligence. Instead, he provides internal management

advice and information technology support for an agency with a humanitarian mission. Thus, a conflict between the interests of the United States and Israel is unlikely.

The potential conflict of interest discussed during the security interview in January 2017 was whether he would be willing to renounce his Israeli citizenship in order to retain his security clearance, and he responded that he would retire from his job rather than renounce his Israeli citizenship. Since renunciation of his Israeli citizenship is not a requirement for retaining his security clearance, there is no conflict of interest within the meaning of AG ¶ 7(b). Thus AG ¶ 7(b) is not established.

Guideline C, Foreign Preference

The SOR alleges that Applicant and his spouse moved to Israel in 1982 with the intention of living there permanently, and that they obtained Israeli citizenship in 1985 (SOR ¶ 2.a); that Applicant served in the Israeli Defense Forces from about 1983 to 1988 (SOR ¶ 2.b); and that Applicant worked in Israel for Israeli defense contractors from about 1982 to 1998 (SOR ¶ 2.c).

SOR ¶ 2.a is not fully established. The evidence does not establish the allegation that Applicant intended in 1982 to living permanently in Israel, because he and his wife returned to the United States in 1988 and lived in the United States for 20 years before returning to Israel. The evidence establishes that Applicant moved to Israel in 2008 and that at some time thereafter, perhaps when they sold their U.S. home in 2015, they seriously considered living permanently in Israel.

The allegation in SOR 1.c that Applicant worked for an Israeli defense contractor until 1998 rather than 1988 is apparently a typographical error. The evidence shows that he returned to the United States in 1988 and began working for a software developer for fitness programs in the United States. He has not worked on any U.S. or Israeli defense contracts since 1988.

The concern under this guideline 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 following potentially disqualifying conditions are potentially applicable:

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

AG ¶ 10(e) using foreign citizenship to protect financial or business interests in another country in violation of U.S. law.

AG ¶¶ 10(a) and 10(d) are established. Applicant is a native-born U.S. citizen who applied for and received Israeli citizenship and served in the Israeli Defense Forces. AG ¶¶ 10(b), 10(c), and 10(e) are not established. There is no allegation in the SOR and no evidence that Applicant failed to disclose his possession of an Israeli passport, failed to use a U.S. passport to enter the United States, or used his Israeli citizenship to protect financial assets in Israel in violation of U.S. law.

The following mitigation conditions are potentially applicable:

AG ¶ 11(a): the foreign citizenship is not in conflict with U.S. national security interests;

AG ¶ 11(b): dual citizenship is based solely on parental citizenship or birth in a foreign country, and there is no evidence of foreign preference;

AG ¶ 11(c): the individual has expressed a willingness to renounce the foreign citizenship that is in conflict with U.S. national security interests;

AG ¶ 11(e): the exercise of the entitlements or benefits of foreign citizenship do not present a national security concern; and

AG ¶ 11(f): the foreign preference, if detected, involves a foreign country, entity, or association that poses a low national security risk;

AG ¶¶ 11(a), 11(e), and 11(f) are established, because none of Applicant's activities are in conflict with U.S. interests and because Applicant's affinity for and connections to Israel pose a low national security risk, due to the nature of his current employment and the absence of the "heightened risk" discussed in the above

discussion of Guideline B. AG ¶¶ 11(b) and 11(c) are not established because Applicant, a native-born U.S. citizen, chose to move to Israel and apply for Israeli citizenship, and he is unwilling to renounce it.

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 and applying the adjudicative factors in AG ¶ 2(d).[3]

I have incorporated my comments under Guidelines B and C in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Applicant is 78 years old and nearing retirement. He was granted a security clearance in 2003, after he lived in Israel for six years, became an Israeli citizen, and served in the Israeli Defense Forces. His employer is aware of Applicant's continuing ties to Israel and continues to sponsor him for a clearance. Applicant has strong ties to both the United States and Israel, and at present he stands with one foot in each country. His attachment to Israel is primarily religious, not political.

Applicant's decision to sell his home in the United States and live in Israel suggests a preference for Israel. His statement to a security investigator that he would give up his job and live in Israel if confronted with a requirement to renounce his Israeli citizenship also suggests a preference for Israel. However, his tentative preference for Israel, standing alone, does not conflict with the national security concerns of the United States. After weighing the disqualifying and mitigating conditions under Guidelines B and C, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his Israeli citizenship, service in the Israeli Defense Forces, residence in Israel, and his tentative preference for living in Israel.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline B (Foreign Influence):	FOR APPLICANT
Subparagraphs 1.a-1.d:	For Applicant

[3] The factors are: (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.

Paragraph, Guideline C (Foreign Preference): FOR APPLICANT

Subparagraphs 2.a-1.c: For Applicant

Conclusion

I conclude that it is clearly consistent with the national security interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman
Administrative Judge