KEYWORD: Foreign Preference

DIGEST: Applicant is 66 years old, divorced, and has two adult sons. She lived for 26 years in Australia, holding a U.S. passport and citizenship the entire time. In 1990, she understood the U.S. changed its policy to allow U.S. citizens to hold Australian citizenship also. She became an Australian citizen and obtained a passport. In 2000, she returned to the U.S. to live again in her home state permanently. Applicant mitigated the foreign preference trustworthiness concern. Eligibility for an ADP I/II/III position is granted.

CASENO: 06-10048.h1

DATE: 07/30/2007

DATE: July 30, 2007

In re:	)	
	)	
----------	)	ADP Case No. 06-10048
SSN: ----------	)	
	)	
Applicant for ADP I/II/III Position	)	
	)	

DECISION OF ADMINISTRATIVE JUDGE
PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT
D. Michael Lyles, Esq., Department Counsel

FOR APPLICANT
Pro Se

SYNOPSIS

Applicant is 66 years old, divorced, and has two adult sons. She lived for 26 years in Australia, holding a U.S. passport and citizenship the entire time. In 1990, she understood the U.S. changed its policy to allow U.S. citizens to hold Australian citizenship also. She became an Australian citizen and obtained a passport. In 2000, she returned to the U.S. to live again in her home state permanently. Applicant mitigated the foreign preference trustworthiness concern. Eligibility for an ADP I/II/III position is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a position of trust for Applicant[1]. On August 15, 2006, DOHA issued a Statement of Reasons[2] (SOR) detailing the basis for its decision–trustworthiness concerns raised under Guideline C (Foreign Preference) of the Directive. Applicant answered the SOR in writing on October 2, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on May 2, 2007. On June 1, 2007, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a trustworthiness determination for Applicant. The Government and the Applicant submitted exhibits that were admitted into evidence. DOHA received the hearing transcript (Tr.) on June 8, 2007.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is 66 years old, divorced, with two adult children (ages 51 and 49). She works for a defense contractor in the health insurance business as a customer service representative. She is a native-born U.S. citizen. She lives alone since her stepfather died, and has no desire to travel outside the U.S. again, to Australia or anywhere else. (Tr. 29, 36, 38, 39; Exhibit 1, Answer)

Applicant visited Australia in 1974 on vacation and liked the topography, climate, and its people. She stayed for 30 days, then returned to her home in the U.S. Applicant was a computer programmer then and could find work in Australia. She applied for residency and obtained a job with an Australian company. She left her 18 and 16 year-old sons here in the U.S. when she moved to Australia. She worked for that company for nine months. Then, she found a job with another company and worked there for 13 years until 1990, when the company moved its information technology operations to Singapore from Australia. She traveled throughout the Pacific region for business while employed with that company. She used her U.S. passport for that travel because it was the only passport she had until 1992. (Tr. 21, 26-29, 33, 36; Exhibits 1-5)

While living in Australia, she married an English citizen who lived in Australia. They were married from 1986 to 1990. She lived in Australia until April 2000, when she returned to live in the U.S. because she missed her father and other family members. She claims she loves the U.S. more than Australia, which why she returned home in 2000. She always intended to return to the U.S., but did not do so earlier because she was married and had a job in Australia. After June 1990 she read in a publication in Australia that the U.S. Government henceforth allowed U.S. citizens to

[1]Adjudication of trustworthiness cases for ADP I, II, and III positions are resolved using the provisions of DoD Directive 5220.6 (Directive), pursuant to the memorandum from Carol A. Haave, Deputy Under Secretary of Defense for Counterintelligence and Security to DOHA Director, *Adjudication of Trustworthiness Cases* (Nov. 19, 2004).

[2]Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and the Directive.

obtain dual citizenship with Australia. She thought she should obtain Australian citizenship because she lived there and wanted to live by the law of Australia because she was there. She would not have applied for it if she thought the U.S. Government would not allow her to have it. Applicant claims she did not swear allegiance to Australia, but only affirmed she would obey its laws. She voted once in an Australian election because the law there requires citizens to vote. She has voted in another Australian election over the internet from the U.S. after 2000, then learned she does not have to vote to avoid breaking Australian law if she is not in the country physically. She will not vote in an Australian election again. She voted once in a U.S. election by absentee ballot since 1974. Applicant would renounce her Australian citizenship to keep her job and resolve any doubts about her trustworthiness, but has taken no overt action to renounce her Australian citizenship. (Tr. 17-27, 29, 30-33, 35, 37; Exhibits 1, 2)

Applicant obtained an Australian passport in 1992. It expired in 2002, and Applicant retains the expired passport. She used her U.S. passport for travel in the Pacific region for work with her former husband, and pleasure trips from 1974 to 2002, and after then. Her boyfriend suggested she get an Australian passport and she did. Then they traveled to England in December 1992, and she used it for that trip, which included travel through the English Channel Tunnel to France. She used that passport to travel to Singapore in 1996. Applicant did use her Australian passport to depart Australia and her U.S. passport on her return on one trip. Applicant would never live in Australia again, but might visit there again to see her friends. Applicant has neither her U.S. nor her Australian passports because they expired and she burned them some time after June 2006 when she submitted copies of both passports to the Government in answer to written interrogatories. (Tr. 20-24, 31, 33 38; Exhibits 2-5)

Applicant claims she did not read carefully her statement to the Government investigator before she signed it on May 25, 2005. She did not write it, the investigator did, and she reviewed it before signing it. Applicant declared above her signature that "This document is true and complete to the best of my knowledge and belief and is made of my own free will. . ." The statements about retaining her Australian citizenship and returning there to live again, she claims are inaccurate. She said her "heart rather than her head" talked for her. Now she claims her future does not include "moving around the world." Her present assertions were made at the hearing. Statements at the bottom of page three and the top of page four concerning no associations with "saboteurs, spies, revolutionist secret agents" are not terms commonly used by someone with a high school education as Applicant has, therefore, they were written by someone else. (Tr. 18, 19, 36; Exhibit 2)

Applicant's uncle testified as to her trustworthiness and character as he knows them. He has known Applicant all her life. He is the younger brother of Applicant's late stepfather. (Tr. 40-49)

Taking notice of historical facts, Australia has a parliamentary government with free elections and civil rights based on English common law. It is part of the British Commonwealth of Nations, former British colonies who are independent countries. Australia has been a strong and consistent ally of the U.S. since at least 1914. The U.S. and Australia are members of the ANZUS treaty pact for self defense in the Southwest Pacific region, formed after World War II. Australia is a member of the international coalition fighting with the U.S. in Iraq presently. The U.S. and Australia fought together against Japanese aggression during World War II in the Pacific Ocean. Australia does not conduct industrial, political, economic, or military espionage against the U.S.

POLICIES

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 occupy a position . . . that will give that person access to such information." *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). 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 the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information with Industry* § 2 (Feb. 20, 1960). By direction of the Under Secretary of Defense for Counterintelligence and Security, adjudications of cases forwarded to DOHA by the Defense Security Service or the Office of Personnel Management (OPM) for a trustworthiness determination shall be conducted under the provisions of the Directive. Eligibility for a position of trust is predicated upon the applicant meeting the guidelines contained in the Directive and a finding it is clearly consistent with the national interest to do so. *See* Directive ¶ 2.3. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his trustworthiness determination." See Directive ¶ E3.1.15

The adjudication process is based on the whole person concept. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required. The decision to deny an individual eligibility to occupy a position of trust is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a such a determination.

In evaluating the trustworthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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 (See Directive, Section E2.2.1. of Enclosure 2). Because each case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible to occupy a position of trust. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's trustworthiness suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of

judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his trustworthiness determination. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

Guideline C: Foreign Preference: *The Concern*: 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 be prone to provide information or make decisions that are harmful to the interests of the United States. E2.A3.1.1

Applicable also is the Memorandum of August 16, 2000, entitled "Guidance of DoD Central Adjudication Facilities (CAF) Clarifying the Application of Foreign Preference Adjudicative Guidelines," by the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASDC3I), commonly known as the "Money Memo.. This memorandum guidance states that

> possession and/or use of a foreign passport may be a disqualifying condition. It contains no mitigating factor related to the applicant's personal convenience, safety, requirements of foreign law, or the identify of the foreign country. The only applicable mitigating factor addresses the official approval of the United States Government for the possession or use. The security concerns underlying this guideline are that the possession and use of a foreign passport in preference to a U.S. passport raised doubt as to whether the person's allegiance to the United States is paramount and it could also facilitate foreign travel unverifiable by the United States. Therefore, consistent application of the guideline requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains official approval for is use from the appropriate agency of the United States Government.

"The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, the person's loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security." (Regulation ¶ C6.1.1.1) Appendix 8 of the Regulation sets forth the adjudicative policy, as well as the disqualifying conditions (DC) and mitigating conditions (MC) associated with each guideline. DoD contractor personnel are afforded the adjudication procedures contained in the Directive. (Regulation ¶ C8.2.1)

CONCLUSIONS

Guideline C - Foreign Preference: Applicant went off on an adventure in 1974. She traveled from her home to Australia, liked it there, and decided to stay. That adventure lasted until 2000, when she realized that she should return to the U.S. to be with her stepfather and other family members. All the time she was in Australia she maintained her U.S. citizenship and a passport. In

1990 she believed she could obtain dual citizenship with Australia because of change in U.S. policy. I believe her explanation that she read about the change in policy in a publication, and proceeded to take advantage of that new policy. So she obtained that citizenship to make it easier for her to travel from Australia and return there as part of her work. She always loved the U.S., but obviously liked Australia enough to remain there for 26 years. But she has lived in the U.S. for the past seven years, a total of 41 of her 66 years of life. Now she is caught between these two countries in her desire to obtain a favorable trustworthiness determination so she can retain her job.

Based on the total facts adduced at the hearing and in the documents, I conclude the Government made a case for applying Disqualifying Conditions (DC) 1 (The exercise of dual citizenship E2.A3.1.2.1), DC 2 (Possession and/or use of a foreign passport E2.A3.1.2.2), DC 5 (Residence in a foreign country to meet citizenship requirements E2.A3.1.2.5), and DC 8 (Voting in foreign elections E2.A3.1.2.8). Applicant did not surrender her Australian passport to the Australian consul or embassy, as the Money Memo requires. She burned both it and her expired U.S. passport sometime between June 2006 and the hearing date.

On the other side of the foreign preference issue, Applicant showed MC 4 (Individual has expressed a willingness to renounce dual citizenship E2.A3.1.3.4) should apply. She now declares she will renounce her Australian citizenship. She has returned to the U.S. Applicant burned her Australian passport. She credibly showed at the hearing she had no desire to go traveling again. I believe she did burn it out of ignorance as to the proper procedures for disposing of it, which would be to return it to the Australian Government with a renunciation of her citizenship. Therefore, she does not possess it nor can she use it.

The issue is whether the total evidence shows Applicant has a preference for Australia over the U.S. I conclude she does not have such a current preference. Her preference based on her statements, her voluntary return to live and work in the U.S. in 2000, her present age, is for the U.S. Australia was a Shangri-la for Applicant that has now faded in the face of her age, desire to be with her family, and her true love for the U.S. She did not obtain Australian citizenship in the first 16 years of living there. If she had taken Australian citizenship after living there a minimum period of time, and renounced her U.S. citizenship at that time, that series of actions would indicate a preference to abandon the U.S. and prefer Australia. She waited to take out Australian citizenship until she honestly thought the U.S. Government would allow her legally to obtain dual citizenship. If the U.S. Government had never allowed dual citizenship, then she would not have taken Australian citizenship. She acted solely on that basis, I conclude.

Whole Person Analysis

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a" trustworthiness decision. Directive E2.2.1. "Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination." *Id.* In evaluating Applicant's case, I have considered the adjudicative process factors listed in the Directive ¶ E2.2.1.

Looking at the factors involved in the "whole person concept," Applicant lived in Australia for 26 years, and took out citizenship there and a passport in 1990 and 1992, respectively. She was an adult when she did it, based on the information she claims she had. She liked Australia, so chose

to live there while maintaining her U.S. citizenship. Now she has returned to the U.S. to live permanently. There is no likelihood Australian officials would coerce, pressure or exploit Applicant for information on the military health care system or its participants. She took out Australian citizenship on the understanding the U.S. had no objection to it, and because she lived there for years, as others might live in European countries, for example, and not be influenced by those governments. My common sense determination is that Applicant cannot be influenced by Australia, a strong U.S. ally. She is trustworthy, and, neither she nor Australia are a threat to the U.S. This analysis is in addition to the conclusions I made in the prior guideline section.

Applicant did not, and does not, prefer Australia over the U.S. Her prior statement to the investigator is now diminished in persuasiveness because she has had two years to think about her intentions and life. Her testimony at the hearing I conclude is more persuasive and credible about her actions and future intentions. Therefore, I conclude the foreign preference and "whole person analysis" for Applicant.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline C:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant

DECISION

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 eligibility for assignment to sensitive duties. Her application for eligibility for an ADP I/II/III position is granted.

Philip S. Howe
Administrative Judge