DATE: March 25, 2003

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 02-02293

DECISION OF ADMINISTRATIVE JUDGE

JOHN G. METZ, JR.

APPEARANCES

FOR GOVERNMENT

Jonathan A. Beyer, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's retention and renewal of his U.K. passport after his naturalization as a U.S. citizen--acts demonstrating potential foreign preference--were mitigated where Applicant had retained the passport for sentimental reasons and because he had never been given any instructions that he should surrender it, had not used the renewed passport (or its precursor) after becoming a U.S. citizen, had indicated an intent to use only his U.S. passport even before he became aware of the "Money Memo", and had surrendered it in accordance with the "Money Memo" once he became aware of its provisions. Applicant's prospective foreign influence was mitigated where his mother was a retired teacher, and none of his siblings worked in any positions connected to the U.K. government. Circumstances of their lives in the U.K. did not suggest that Applicant would be subject to pressure on their behalf. Similarly, Applicant's foreign financial interests--in the form of a life insurance policy, an annuity, a prospective pension, and two rental properties--presented no prospect of coercion or duress. Clearance granted.

STATEMENT OF THE CASE

On 9 October 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding[(1)] that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On 31 October 2002, Applicant answered the SOR and requested a hearing. The case was originally assigned to a different Administrative Judge, but was reassigned to me on 8 January 2003 because of case load considerations, and received by me the same day. On 15 January 2003, I set the case for hearing and issued a Notice of Hearing (NOH) on 17 January 2003 for a hearing on 6 February 2003.

At the hearing, the Government presented four exhibits--admitted without objection--and no witnesses; Applicant presented eight exhibits--also admitted without objection--and the testimony of one witness, himself. DOHA received the transcript on 14 February 2003.

PROCEDURAL ISSUES

On 17 February 2003, Applicant submitted A.E. I--a 29 January 2003 letter from the National Insurance Contributions Office responding to Applicant's 22 January 2003 conversation with that office. Although, Applicant testified (Tr. 40) that he was awaiting a letter from this office to confirm his testimony that he had ceased paying into the U.K. social security system, he did not request that the record be kept open, and truthfully, I overlooked it. And while Applicant's 17 February 2003 cover letter did not request Department Counsel include the enclosure in the record of hearing, Department Counsel forwarded Applicant's package to me on 27 February 2003. After noting that the record had not been kept open for the receipt of any post-hearing evidence, Department Counsel neither objected nor consented to its admission.

In the interest of a complete record and equity, I admit Applicant's post-hearing submission as A.E. I. I note that I routinely hold the record open on my own motion to accept just such submissions, usually without objection by Department Counsel, and only an oversight on my part prevented me from following that practice here. Further, as an evidentiary matter, not to object is to consent, and Department Counsel has raised no objection to my considering A.E. I. Although Applicant proffered it to Department Counsel only as corroboration of Applicant's claim that he had stopped paying into the U.K. social security system, I will consider it corroborative of the following points testified to by Applicant during the hearing: that Applicant's contributions to the system as a non-resident are voluntary, that he is now vested in a state pension but his entitlement will not grow now that his contributions have stopped, that the contributions have stopped, and that Applicant could resume contributions in the future.

At the hearing, Department Counsel requested that I take official notice of the "Money Memorandum"[(2)] and the "Totalization Agreement with the United Kingdom." I granted the motion (Tr. 27).

FINDINGS OF FACT

Applicant admitted the allegations of the SOR; accordingly I incorporate those admissions as findings of fact.

Applicant--a 52-year-old employee of a defense contractor--seeks to retain the access to classified information he has held since 1990. With the exception of a brief period between 1986 and 1990, he has continuously held a clearance of some kind since coming to the United States in 1977. His job requires a security clearance (A.E. A, B, C).

Applicant was born in England in 1950, making him a citizen of the United Kingdom. He grew up in England and was educated there, obtaining his bachelor's degree in mathematics and physics from a prestigious university in 1974. He worked in a bank for a little more than two years before going to work for an English electronics firm. In 1977, he came to the U.S., at age 27, on a work visa related to his intra-company transfer. The U.S. subsidiary of his English company had a joint contract with a U.S. company producing classified electronic equipment for the U.S. Army. Applicant obtained a U.S.-U.K. reciprocal clearance[(3)] to work on the contract. In 1982, Applicant was concerned about having to return to England if he ever lost his work-visa status. Applicant asked his employer to help arrange his legal permanent resident status. The company agreed and applicant obtained resident status in the U.S. in 1983. He later applied for U.S. citizenship and became a naturalized citizen in April 1989.[(4)] He obtained his U.S. passport in May 1989.

When Applicant became a U.S. citizen, he possessed a U.K. passport that he renewed in January 2000--after his naturalization as a U.S. citizen--while on an extended company assignment in Japan. This passport would not expire until January 2010. Applicant never used his U.K. passport (G. E. 4) and surrendered it to the British Embassy in December 2002 (A.E. G) when he became aware of the provisions of the "Money Memorandum."

When Applicant went to work in the U.K. after graduation, he began mandatory contributions to the British equivalent of social security. When he came to the U.S. on his work visa, he continued to make those mandatory contributions as required by U.S./U.K. law as formalized in the "Totalization Agreement with the United Kingdom."[(5)] In approximately 1981 or 1982, Applicant stopped paying into the U.K. social security system and began paying into the U.S. social security system.[(6)] However, in approximately 1988 or 1989, he discovered through a friend that he could make voluntary contributions to the U.K. social security system at a reduced rate for non-residents and receive a social security pension at age 65. He also discovered he could make up to six years of back payments. The voluntary contributions are not contingent on Applicant's citizenship.[(7)]Applicant made back payments in 1988-1989, and

continued to make contributions of approximately $15.00-20.00 per month (Tr. 46) until January 2003, when he discontinued his contributions (A.E. I). He is eligible for a pension, and eligible to resume contributions. He estimates that his contributions to date entitle him and his wife to payments of approximately $90.00 per week when he reaches age 65. This amount would increase if he resumed contributions. He would also be entitled to free medical care if he resided in the U.K., but he considers his company-sponsored medical plan to be more advantageous and he has no plans to return to the U.K. to live (Tr. 52-53). He has been paying into the U.S. social security system since 1982. He is vested in both plans.

On 5 September 2000, Applicant executed a Security Clearance Application (SCA)(SF 86) (G.E. 1) on which truthfully disclosed his foreign connections and travel.

On 26 October 2001, Applicant gave a sworn statement to a Special Agent of the Defense Security Service (DSS) (G.E. 3), describing his foreign connections, particularly his U.K. passport and his potential foreign preference:

I do have dual citizenship [and a foreign passport]. My foreign passport reflects no travel. The reason I keep my foreign passport: I feel more comfortable to retain it. . .

I would not be willing to renounce my dual citizenship if necessary as a condition of access. The reason is I was born in Britain and want to retain that citizenship. As previously stated, I do have a foreign passport. Yes, I held my foreign passport after obtaining my U.S. citizenship.

I first obtained my foreign passport on 7 Apr 70 in Great Britain, before I became a U.S. citizen. I renewed my foreign passport on 28 Jan 00; it expires 28 Jan 10. Initially, I obtained the foreign passport when I was a citizen of the U.K., and used it to be in the U.S. Now, I retain the foreign passport because I feel more comfortable to retain it. I have not used my foreign passport to travel since I became a naturalized U.S. citizen. I use my American passport. I do not use my foreign passport so I do not know of any obligations or responsibilities when using my foreign passport.

I would not be willing to relinquish my foreign passport as a condition of access. The reason I would not relinquish foreign passport as a condition of access is because I feel more comfortable to retain it.

I would be willing to bear arms for the U.K.

He also disclosed that he owned two rental properties in the U.K. and maintained a bank account and two savings accounts for dealing with financial transactions related to managing the two properties.

At the hearing, Applicant described what he meant when he said he would be willing to bear arms for the U.K. (Tr. 52):

I don't know what I meant. I wanted to retract that and say I wouldn't bear arms for the U.K. I would bear arms for the U.S. as is part of the swearing in ceremony to be a U.S. citizen. I think I meant if it was a sanctioned by the U.S. would bear arms for the U.K., but I would certainly never bear arms for the U.K. against the U.S.

Applicant initially retained his U.K. passport because he knew of no reason not to. He did not surrender it after he got his U.S. passport because he had received no indication that he should do so. He used only his U.S. passport on trips, because although he renewed his U.K. passport for sentimental reasons, he always knew that he should not use it (Tr. 38-39, 50-51).

Applicant's mother, two sisters and a brother are U.K. citizens living in the U.K. He has another sister who is a U.K. citizen living in Turkey with her husband. His mother is a retired teacher; none of his siblings work for the government (Tr. 22, 53). Applicant sees his relatives when he is in the U.K. on business, and has also taken family vacations to Europe and the U.K. so his child (Applicant and his wife are expecting their second) can spend time with her grandmother.

Applicant acquired the two English properties in 1993 and 1999 (and opened the bank accounts) because he wanted to diversify his financial holdings. He did not have confidence in his ability to invest in the stock market, but understood real estate, having acquired a rental home as well as his residence in the U.S. The market was good in the U.K. and

being from the U.K. it was easier for Applicant to buy property there, although citizenship is not required for property ownership in the U.K. (Tr. 22). Applicant's equity in the two rental properties in the U.K. is approximately $410,000.00-460,000.00. They rent for approximately $4,400.00 per month, out of which Applicant has to pay the mortgages, insurance, agency management fees, and other operating expenses. He has cash accounts for managing the properties containing approximately $52,000.00 and a whole life insurance policy worth about $25,000.00. Total assets in the U.K.: $487,000.000-537,000.00. Applicant's equity in the house he lives in and a rental home in another state is approximately $325,000.00. He has three 401K/IRA accounts totaling $247,000.00. Total U.S. assets, not counting any personal bank accounts or his salary: $572,000.00 (Tr. 56-66). Applicant votes in local elections in the U.S. (AE. E) and pays significant property tax on his U.S. residence (A.E. F). He is willing to liquidate his English bank accounts and sell his properties, although he asks for some latitude on the timing of the sale so as to not lose money (Tr. 23).

Applicant's supervisor--who has know him for fourteen years--Applicant a trustworthy individual, loyal only to the U.S., who has made safeguarding classified information a top priority in his job (A.E. D).

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section F.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc*.

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

FOREIGN PREFERENCE (GUIDELINE C)

E2.A3.1.1 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.A3.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A3.1.2.1. The exercise of dual citizenship;

E2.A3.1.2.2. Possession and/or use of a foreign passport;

E2.A3.1.2.3. Military service or a willingness to bear arms for a foreign country;

E2.A3.1.2.4. Accepting educational, medical, or other benefits, such as retirement and social welfare, from a foreign country;

E2.A.1.3. Conditions that could mitigate security concerns include:

E2.A3.1.31. Dual citizenship is based solely on parents' citizenship or birth in a foreign country;

E2.A3.1.3.2. Indicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship.

E2.A3.1.3.3. Activity is sanctioned by the United States;

FOREIGN INFLUENCE (CRITERION B)

E2.A2.1.1. The Concern: A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States

or may be subject to duress. These situations could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

E2.A2.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A2.1.2.1. An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident in, a foreign country;

E2.A2.1.2.8. A substantial financial interest in a country, or in any foreign-owned or -operated business that could make the individual vulnerable to foreign influence.

E2.A2.1.3. Conditions that could mitigate security concerns include:

E2.A2.1.3.1. A determination that the immediate family member(s). . . in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States.

E2.A2.1.3.4. The individual has promptly reported to proper authorities all contacts, . . . from a foreign country, as required;

E2.A2.1.3.5. Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities.

On 16 August 2000, the Assistant Secretary of Defense, Command, Control, Communications, and Intelligence (ASD, C^3I) issued a memorandum (the "Money emo") to clarify the application of Guideline C., Foreign Preference, to cases involving possession and/or use of a foreign passport. In pertinent part, the ASD, C^3I memorandum **"requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government."**(Emphasis added).

Burden of Proof

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with

the U.S. Government that is predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability, or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

CONCLUSIONS

Although Applicant possessed and renewed a U.K. passport after his naturalization in 1989--an exercise of dual citizenship--he has not otherwise exercised dual citizenship with the U.K. While his U.S. citizenship oath may not operate to terminate his U.K. citizenship under U.K. law, the citizenship oath gives a strong indication of an intent to sever ties to the birth country. Nevertheless, his foreign citizenship possesses little security significance if based solely on his birth in a foreign country. For Applicant's conduct to fall within the security concerns of Guideline C, Foreign Preference, he must have acted in a way to indicate a preference for a foreign nation over the United States. However,

inimical intent or detrimental impact on the interests of the United States is not required before the Government can seek to deny access under Guideline C. The Government has a compelling interest in ensuring those entrusted with this Nation's secrets will make decisions free of concerns for the foreign country of which they may also be a citizen. Under this assessment, I conclude the Government has established its case under Guideline C. Nevertheless, I conclude that Applicant has mitigated the security concerns.

Applicant convincingly asserts that he prefers his U.S. citizenship. The single instance of conduct to the contrary--retaining and renewing his U.K. passport after becoming a U.S. citizen--is mitigated by a number of factors. First, he credibly asserts that he retained the passport as a souvenir of his birth country and because of the comfort value it provided. It seems clear that he also did not know what else to do with it, and had no reason to know that he should dispose of it. Second, he never used the passport; even when traveling to the U.K., Europe, and Japan he used his U.S. passport, although it would have been more convenient to use his U.K. passport at least to Europe and the U.K. Third, before becoming aware of the specifics of the "Money Memo," he stated a clear intention to use only his U.S. passport for foreign travel. Finally, when he became aware of the requirements of the "Money Memo," he surrendered the passport to the British Embassy.

Under the circumstances of this case, Applicant's participation in the U.K. social security system, even as a U.S. citizen, lacks security significance. An international agreement between the U.S. and the U.K. clearly contemplates, indeed requires, some U.S. citizens to participate in the U.K. social security system and U.K. citizens to participate in the U.S. social security system--as Applicant did in 1982 before becoming a U.S. citizen. These requirements exist regardless of the respective citizen's dual citizenship status. Applicant's later participation in the U.K. system does not fall withing the contemplation of the international agreement, particularly where he has now participated in both U.S. and U.K. systems to the point where he is vested in both but the security significance does not change. Since his later participation was voluntary and not contingent on any citizenship status it cannot be considered evidence of a foreign preference; more a prudent investment to economically add to his retirement income.

Applicant had stated a willingness to bear arms for the U.K. but credibly explains that he would only do so if authorized by the U.S. and in no event would bear arms for the U.K. against the U.S. In addition, Applicant has resided in the U.S. since he was 27 years old (except for brief company assignments overseas). His national preference seems overwhelmingly for the U.S., notwithstanding that he would prefer to not formally renounce his U.K. citizenship. Accordingly, I resolve Guideline C. for Applicant.

In a similar fashion, the Government has established its case under Guideline B., but I consider the security concerns mitigated. Applicant's immediate family are U.K. citizens residing in the U.K. His contacts with his family are not casual and infrequent. However, the record evidence clearly indicates that Applicant's relatives are not agents of a foreign power, nor are they in a position to be exploited by a foreign power.[(8)] Common sense demonstrates there is nothing in the record to suggest that the family's relationship with Applicant is such that Applicant would be forced to chose between his duty to his parents and his duty to the U.S. In a similar fashion, although Applicant's U.K. bank accounts and property holdings are clearly substantial, his U.S. holdings, which do no take into account any personal bank accounts or his greater social security investment are already substantially higher. Further, the political and economic underpinnings of the U.K. make Applicant's foreign holdings an unlikely point of influence--an important element of the disqualifying factor. I conclude that Applicant's holdings are nevertheless not sufficient to affect his security responsibilities. Accordingly, I resolve Guideline B. for Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline B: FOR THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

Subparagraph e: For the Applicant

Paragraph 2. Criterion C: FOR THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated 2 January 1992--amended by Change 3 dated 16 February 1996 and by Change 4 dated 20 April 1999 (Directive).

2. The 16 August 2000 memorandum of the Assistant Secretary of Defense, Command, Control, Communications, and Intelligence (ASD, C^3I), so-called the "Money Memorandum" because it is signed by Assistant Secretary Arthur L. Money.

3. Applicant also thinks it might have been a NATO clearance.

4. Although Applicant's employer sent him out of the country on permanent assignment, Applicant took the necessary steps to ensure that his time out of the country would not count against him for purposes of meeting his U.S. residency requirement for naturalization (Tr. 70).

5. The agreement accomplished two things. First, it ended the double social security taxation of U.S. and U.K citizens residing in the other country. Second, it provided a means for U.S. and U.K. citizens who worked in both countries without acquiring sufficient work credits to qualify for social security in any one country to combine work credits from both countries and qualify for social security under formulas established in the agreement.

6. Consistent with agreement requirements for workers residing in the other country more than five years.

7. As evident from the agreement requirement that U.S. citizens residing in the U.K. for more than five years begin making contributions to the U.K. social security system.

8. I note that the United Kingdom is a free society whose democratic institutions are similar to our own, long preceded our own, and indeed form the basis for our own. While the U.S. does not share a unity of interests with the U.K., both governments have long acknowledged the special relationship between the two countries. The U.K. is neither a totalitarian regime, nor a regime known to engage in human rights violations, nor a known sponsor of state terrorism. Thus, it is extremely unlikely that the U.K. government would target Applicant's family to extract information from Applicant. Consequently, I conclude that Applicant's family is not in a position to be exploited by a foreign power in a way that could force Applicant to choose between loyalty to his family and the U.S., based on all available evidence.