DATE: September 30, 2005

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In Re:

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

Applicant for Security Clearance

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CR Case No. 02-14202

**DECISION OF ADMINISTRATIVE JUDGE**

**MATTHEW E. MALONE**

**APPEARANCES**

**FOR GOVERNMENT**

Eric Borgstrom, Esquire, Department Counsel

Julie Edmunds, Esquire, Department Counsel

**FOR APPLICANT**

John Mardula, Esquire

**SYNOPSIS**

Applicant, a U.S. citizen by birth, obtained foreign citizenship, held a foreign passport, obtained a foreign government security clearance, and voted in foreign elections while living abroad for business reasons from 1991 until 1998. His wife and children, also U.S. citizens by birth, lived abroad with Applicant, and obtained the same foreign citizenship. Applicant and his family now live in the United States, and he renounced his foreign citizenship and returned his foreign passport. The Guideline B concerns stemming from his family's ongoing foreign citizenship and minimal contacts with foreign nationals are mitigated; however, he has failed to mitigate the Guideline C concerns about possible foreign preference. Clearance is denied.

**STATEMENT OF THE CASE**

After reviewing the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding[(1)] it is clearly consistent with the national interest to give Applicant a security clearance. On November 21, 2003, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline B (foreign influence) and Guideline C (foreign preference). Applicant timely answered the SOR, and he requested a hearing.

The case was assigned to me on January 4, 2005, and I convened a hearing on April 12, 2005. The parties appeared as scheduled and stipulated to the admissibility of six government exhibits (GE 1 - 6) and eight Applicant exhibits (AE A - H). Applicant also testified in his own behalf, and presented the testimony of two other witnesses. Additionally, I left the record open after the hearing to allow Applicant to submit a written statement from a witness unable to appear at hearing. Applicant timely submitted an additional exhibit admitted into the record without objection as AE I. DOHA received the transcript (Tr) on April 21, 2005. Issuance of this decision was delayed due to an unusually large case load.

**PROCEDURAL ISSUE**

Pending issuance of this decision, Applicant made a post-hearing submission consisting of a cover letter from Applicant's attorney, dated September 7, 2005, which forwarded an unsigned copy of a Security Clearance Application (SF 86) dated September 7, 2005. The cover letter also referred to a "Certificate of Clearance;" however, no such document was enclosed. Applicant represents through this submission he has been granted a security clearance in connection with his duties as an employee of the Federal Energy Regulatory Commission (FERC),[(2)] and that FERC's decision was based on the same information before me. Applicant also acknowledges FERC's decision "would not be *res judicata*" as to DOHA's adjudication of Applicant's request for an industrial security clearance. (italics in the original)

The record in this case closed on May 16, 2005, when I received AE I. Because I made no arrangements to receive any other post-hearing evidence, Applicant's September 7, 2005, submission constitutes new evidence and will not be considered. I have, however, marked this submission as AE J and included it in the record for possible use on appeal.

Alternatively, the submission of AE J raises a possible issue of reciprocity in the interests of administrative efficiency as addressed in the *National Industrial Security Program Operating Manual (NISPOM)*, DoD 5220.22-M, as amended. Specifically, Section C2.2.4 provides:

**Reciprocity.** Federal Agencies that grant Security clearances (TOP SECRET, SECRET, CONFIDENTIAL, Q or L) to their employees or their contractor employees are responsible for determining whether such employees have been previously cleared or investigated by the Federal Government. Any previously granted PCL that is based upon a current investigation of a scope that meets or exceeds that necessary for the clearance required, shall provide the basis for issuance of a new clearance without further investigation or adjudication unless significant derogatory information that was not previously adjudicated becomes known to the granting Agency.

The NISPOM's provision regarding reciprocity apparently encompasses all federal agencies; however, my authority is limited to the provisions of DoD Directive 5220.6. Specifically, Section 2.1 of the Directive limits the scope of actions to which the Directive applies to "the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Inspector General of the Department of Defense (IG, DoD), and the Defense Agencies (hereafter referred to collectively as "the DoD Components")." The Directive also extends by inter-agency agreements to 20 other federal agencies specifically listed in Section 2.2 of the Directive. FERC is not one of the agencies listed. Therefore, even were I to admit for consideration Applicant's September 7, 2005 submission into the record, I would conclude reciprocity does not extend to Applicant as the federal agency that has apparently granted him a security clearance is outside the scope of the Directive.

## FINDINGS OF FACT

Applicant's admissions in his Answer are entered as facts. After a thorough review of the pleadings, transcript, and exhibits, I also find the following:

Applicant is 59 years old and was born, raised, and educated in the United States. He served in the U.S. Army on active duty and in the reserves from 1966 until 1973. Thereafter, he received a commission in the U.S. Navy, where he served on active duty until his retirement as a lieutenant commander in July 1990. Applicant and his wife have been married for 34 years and have two adult children, a daughter born in the United States, and a son born in Great Britain while Applicant was assigned there by the Navy. Applicant has held several security clearances to the top secret level.

Applicant's field of expertise is in information technology (IT) with a special emphasis in information security. At the time he retired in 1990, information security was a relatively new aspect of the IT industry. As he explored his civilian employment opportunities after retirement, Applicant developed contacts in the Australian military and defense contracting communities. He had visited Australia while in the Navy and liked the country enough to consider moving there. On retirement, he obtained a job offer with a private defense contractor there and used his last Navy household goods move to relocate with his family to Australia. While exploring employment options in Australia, Applicant at one time considered joining the Australian military as a way of establishing himself there.

In 1991 and in 1993, Applicant consulted the State Department about his plans to move to Australia and possibly

become a foreign citizen.[(3)] Specifically, he was concerned about any possible impact on his U.S. citizenship and on his continued eligibility for military retirement pay. Neither inquiry was concerned about possible adverse effects of his dual nationality status on his eligibility for a U.S. security clearance. Rather, the State Department advised Applicant he could maintain his U.S. citizenship while still holding Australian citizenship because (a) he was not engaged in work with a foreign government at the national level or in a policy-making position, and (b) he had not demonstrated an intent to revoke his U.S. citizenship.

Applicant needed a security clearance for his work in the Australian defense industry. When Applicant arrived in Australia, he was granted classified access by that government based solely on the fact he held an active U.S. security clearance. However, that arrangement was good for only three years. Thereafter, Applicant would have to become an Australian citizen to receive or continue his Australian security clearance. Applicant determined he was eligible for Australian citizenship based on his permanent residence and work status there for over two years. He applied for and received Australian citizenship in May 1995. He also received an Australian passport he used to exit and enter Australia, while using his U.S. passport for all other international travel. While in Australia, Applicant voted in Australian elections because it was legally required of all Australian citizens. After receiving his Australian citizenship, Applicant's Australian security clearance was renewed.

When Applicant and his family first moved to Australia as U.S. citizens, they were required to have Australian visas as well as their U.S. passports to enter that country. Because they were to be living and working in Australia for an extended period, Applicant and his family received visas good for ten entries into Australia. However, when Applicant became an Australian citizen and received a passport, his family's visas were cancelled because they had become dependents of an Australian citizen. Thus, his wife and children also obtained Australian citizenship so they could get Australian passports.

Applicant supported a variety of Australian government agencies as a contractor. Those agencies were part of Australia's defense, intelligence, criminal investigative, and energy communities. While he listed in his SF 86 those governmental agencies as his employers, he was actually an employee of defense contractors doing business with those agencies and generally not directly employed by those agencies. However, it appears he worked as a direct hire by the Australian Bureau of Statistics, albeit as a temporary employee for six months, with a different pay structure than permanent employees receive there. When he turns 65, Applicant will receive about $5,000 from a retirement fund assigned to him when he worked in this position. This amount represents less than 1% of Applicant's total net worth and he has been unable to cancel the account or decline the money.

Applicant currently owns his own consulting business, which markets its services in the IT industry to defense agencies. While in Australia, he also started his own contracting business and developed business and personal relationships with two Australian nationals, one of whom was a government employee there. His contact with both persons since Applicant left Australia seven years ago has been minimal, with the last known contact occurring almost two years ago.

Applicant and his family returned to the United States in 1998 and have no intentions of again living outside the United States. He relinquished his Australian passport in November 2003 by turning in to the Australian embassy in Washington, D.C. The Australian government has officially cancelled the passport. Just prior to this hearing, Applicant also formally renounced his Australian citizenship on advice of counsel. Surrender of his foreign passport was motivated by his receipt of the SOR and a memorandum outlining DoD policy against awarding clearances to persons in possession of a foreign passport. However, he did not relinquish his foreign citizenship at that time because he claims he did not immediately recognize the security significance of his dual citizenship.

In January 2002, Applicant was interviewed by an agent of the Defense Security Service (DSS) as part of the current DoD background investigation. In a signed, sworn statement he submitted in connection with that interview, Applicant acknowledged at that time he retained his Australian passport and citizenship for convenience in travel to Australia and that he hoped his Australian citizenship would be advantageous in his efforts to market his company's services in Europe and Asia. However, at hearing, he testified he was mistaken about having any such advantage.

Applicant's wife and children still hold Australian and U.S. citizenship, but live in the U.S. His son also holds British citizenship as a result of his birth in Great Britain while Applicant was stationed there. Applicant's son recently renewed

his Australian passport.

Aside from the aforementioned retirement fund from the Australian Bureau of Statistics, Applicant has no property or other interests in Australia. He closed his business before leaving and does not have any current business arrangements with any public or private Australian entity.

Applicant enjoys a good reputation as being reliable, professional, and trustworthy. A former associate who works as the chief information security officer for a nationally-known corporation, Applicant's brother, who also works in the IT security field, and his current supervisor at FERC have vouched for Applicant's attention to detail and honesty, and recommended Applicant for a position of trust.

## POLICIES

The Directive sets forth adjudicative guidelines[(4)] to be considered in evaluating an Applicant's suitability for access to classified information. Security clearance decisions must reflect consideration of both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are Guideline B (foreign influence) and Guideline C (foreign preference).

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest[(5)] for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for the Applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it establishes that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, the Applicant bears a heavy burden of persuasion.[(6)] A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.[(7)]

## CONCLUSIONS

Under Guideline B, 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 create the potential for foreign influence that 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.[(8)] Available information in this case shows Applicant lives in the U.S. with his wife and children, who are dual citizens of the U.S. and Australia. Additionally, one of his children also holds British citizenship by virtue of his birth in that country while Applicant was assigned there by the U.S. Navy. These facts, alleged in SOR ¶¶ 2.a and 2.b, support application of Guideline B disqualifying condition (DC) 1.[(9)]

By contrast, I conclude Guideline B mitigating condition (MC) 1 applies to Applicant's immediate family. His wife and children are not and never have been agents of any foreign government within the meaning of the term under U.S. federal law.[(10)] However, Applicant's ultimate burden of persuasion in this case required him to also show his relatives are not in a position to be exploited by the Australian government so as to force Applicant to chose between his responsibility to U.S. interests and loyalty to family. While in theory the mere fact an applicant's relatives are citizens of

a foreign country may be enough to disqualify one from holding a clearance, the analysis does not end there. In this instance, the relatives in question have lived in the U.S. since 1998. It is unlikely they would be targeted by a close ally such as Australia while living in that country much less while living in the U.S.

Further, adjudication of this issue requires consideration of the whole body of record evidence available, including the nature and circumstances of the country involved. Australia is a democracy modeled after the parliamentary system of Great Britain. Theirs is an open, democratic society with an independent judiciary and no record of human rights abuses. Australia is also a staunch ally of the U.S. in the global war on terrorism and has supported the United States in every major armed conflict since World War I. In light of the foregoing, and in consideration of the fact Applicant's family is no longer physically subject to the Australian government, I conclude there is no risk the Australian government will try to leverage for its own national interests Applicant's access to classified information through his close ties with Australian citizens. He is entitled to the full weight of MC 1.

As alleged in SOR ¶ 2.c, Applicant was acquainted with two associates he worked with while living in Australia. However, those contacts have been tenuous at best over the seven years since Applicant left Australia, and there has been no contact with either person in almost two years. I conclude these associations have no security significance. Alternatively, MC 3[(11)] would apply here. Further, no security significance attaches to the fact Applicant may receive at most $5,000 from an Australian retirement account (SOR ¶ 2.d) over which he has no control and which represents less than %1 of Applicant's total net worth. This foreign account does not constitute a substantial financial interest in a foreign country as contemplated by Guideline B DC 8.[(12)] In the alternative, Guideline B MC 5[(13)] would also apply.

Lastly, available information supports the allegation in SOR ¶ 2.e, which repeats as a matter of alleged foreign influence, the allegations of foreign preference in SOR ¶¶ 1.i through 1.n. However, Applicant has demonstrated he was not directly employed by those governmental entities, and those business relationships ended seven years ago. Even if he were so employed, these facts would not be disqualifying under Guideline B. At most, the business he owned while in Australia would fall within the ambit of DC 8, but that foreign interest no longer exists. On balance, I conclude Guideline B for the Applicant.

As to the Guideline C allegations, an applicant who acts in such a way as to indicate a preference for a foreign country over the United States may be prone to provide information or make decisions that are harmful to the interests of the United States.[(14)] Here, the government has presented sufficient evidence to establish, as alleged in SOR ¶¶ 1.a, 1.b, 1.d, and 1.f, that Applicant, a U.S. citizen by birth, lived in Australia from 1991 until 1998, obtained and exercised Australian citizenship, and voted in Australian elections. As alleged in SOR ¶¶ 1.e and 1.h, Applicant obtained Australian citizenship to further his own business and career interests in that country, to obtain an Australian security clearance, and to possibly enhance his business prospects in other Asian and European countries. The government also established, as alleged in SOR ¶¶ 1.c and 1.g, that Applicant received and used a foreign passport in lieu of his U.S. passport.

To the extent the allegations in SOR ¶¶ 1.i through 1.n imply that Applicant was a direct employee of the Australian government, except for SOR ¶ 1.m, available information shows his employment in Australia was as a defense contractor for Australian defense, maritime, law enforcement, intelligence, and energy agencies. However, because his work was in support of Australian governmental interests rather than those of the U.S., I conclude DC 9[(15)] applies.

All of the foregoing information supports application of several Guideline C disqualifiers. DC 1,[(16)] DC 2,[(17)] and DC 8[(18)] are applicable based on Applicant's acquisition of Australian citizenship while still a U.S. citizen, his possession and use of an Australian passport while still holding a U.S. passport, and the fact he twice voted in Australian elections. Applicant's position in response to these SOR allegations is that he was required by Australian law to use that country's passport and to vote in their elections. While this may be true, it was Applicant's affirmative decision to obtain Australian citizenship and subject himself to those laws and receive the benefits of Australian citizenship that put him in that position.

On the facts presented, DC 5[(19)] and DC 6[(20)] also apply. Applicant moved to Australia in 1991 to pursue business interests. He stayed there long enough to receive citizenship so he could renew his foreign government security

clearance, thus allowing him to continue work as a government contractor and pursue opportunities for his own small business. He now claims otherwise, but as recently as 2002, Applicant believed his Australian citizenship gave him an advantage in marketing his contracting services to other foreign governments.

Although not alleged, the government also established that Applicant considered joining the Australian military. I find this material to this decision in that Guideline C DC 3[(21)] addresses such conduct as potentially disqualifying. Applicant was apparently willing to bear arms for Australia if it would help open opportunities for him there.

Guideline C DC 2 has no corresponding Mitigating Condition (MC), a situation addressed by an Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASDC3I) memorandum issued in August 2000. Here, Applicant properly surrendered his foreign passport when he was informed through the aforementioned memorandum of the DoD policy precluding granting or continuing a clearance for someone who holds a valid foreign passport. Insofar as Applicant has also relinquished his foreign citizenship, Guideline C MC 4[(22)] applies and his use of a foreign passport is no longer of concern.

Even with the applicable mitigating conditions in mind, I conclude Guideline C against the Applicant. The gravamen of this case is Applicant's willingness to place himself in a position where his own business interests and the interests of another country take priority over those of the United States. His inquiries to the State Department about the impact of his actions on his U.S. citizenship were well founded, but his primary interest was in maintaining his eligibility for U.S. military retired pay. He was not concerned about his status as a U.S. security clearance holder and deliberately traded on that status to gain entry to an Australian security clearance and business opportunities there. Unlike the analysis under Guideline B, the fact the foreign country in question may be friendly is secondary to the fact Applicant's conduct, regardless of the country involved, placed the interests of another country ahead of those of the United States. Indeed, Applicant was considering using his foreign citizenship as an entree to other similar foreign markets, and it appears he held onto his Australian citizenship as long as he could for that purpose.

I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed under each applicable adjudicative guideline. No single fact or adjudicative condition is dispositive of my decision here. Rather, a fair and commonsense assessment[(23)] of the totality of facts in the record before me shows Applicant's ties to foreign citizens and his ties (or lack thereof) in a foreign nation do not present an unacceptable security risk. However, it also shows Applicant has demonstrated a somewhat mercenary approach to his status as a holder of U.S. citizenship and a U.S. security clearance such that he deliberately subordinated the interests of his own government to those of another nation. Even bearing in mind his considerable qualifications and his record of military service to the country, his actions in this regard present an unacceptable security risk which undermines the U.S. government's confidence he will act in a manner clearly consistent with the national interest should his clearance be continued.

## FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Foreign Preference: AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: Against the Applicant

Subparagraph 1.d: Against the Applicant

Subparagraph 1.e: Against the Applicant

Subparagraph 1.f: Against the Applicant

Subparagraph 1.g: Against the Applicant

Subparagraph 1.h: Against the Applicant

Subparagraph 1.i: Against the Applicant

Subparagraph 1.j: Against the Applicant

Subparagraph 1.k: Against the Applicant

Subparagraph 1.l: Against the Applicant

Subparagraph 1.m: Against the Applicant

Subparagraph 1.n: Against the Applicant

Paragraph 2, Foreign Influence FOR THE APPLICANT

Subparagraph 1.a: For the Applicant

Subparagraph 1.b: For the Applicant

Subparagraph 1.c: For the Applicant

Subparagraph 1.d: For the Applicant

Subparagraph 1.e: For the Applicant

**DECISION**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

2. Applicant has been employed at FERC since November 2003. He also seeks a clearance from the Department of Defense in connection with his privately-owned defense contracting company.

3. AE A through D.

4. Directive, Enclosure 2.

5. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).

6. *See Egan,* 484 U.S. at 528, 531.

7. *See Egan;* Directive E2.2.2.

8. Directive, E2.A2.1.1.

9. Directive, 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 or present in, a foreign country;

10. *See,* 50 U.S.C. §1801(b).

11. Directive, E2.A2.1.3.3. Contact and correspondence with foreign citizens are casual and infrequent;

12. Directive, 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.

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

14. Directive, E2.A3.1.1.

15. Directive, E2.A3.1.2.9. Performing or attempting to perform duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

16. Directive, E2.A3.1.2.1. The exercise of dual citizenship;

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

18. Directive, E2.A3.1.2.8. Voting in foreign elections;

19. Directive, E2.A3.1.2.5. Residence in a foreign country to meet citizenship requirements;

20. Directive, E2.A3.1.2.6. Using foreign citizenship to protect financial or business interests in another country;

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

22. Directive, E2.A3.1.3.4. Individual has expressed a willingness to renounce dual citizenship.

23. Directive, E2.2.3.