DATE: October 23, 2006

In re:

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

Applicant for Security Clearance

CR Case No. 05-10436

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant holds an active Australian passport. His mother is an Australian citizen residing in the U.S. His grandfather is a citizen and resident of Australia. His brother and sister are dual U.S.-Australian citizens residing in the U.S. His spouse, father-in-law, and mother-in-law are citizens and residents of Austria. Security concerns based on foreign preference and foreign influence are not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On March 10, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to not grant a security clearance to Applicant. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleges security concerns under Guidelines C (Foreign Preference) and B (Foreign Influence). Under Guideline C, it alleges Applicant exercised dual citizenship with the U.S. and Australia by possessing an active Australian passport (¶¶ 1.a and 1.b). Under Guideline B, it alleges his wife is a citizen of Austria residing in the U.S. (¶ 2.a); his mother is a citizen of Australia residing in the U.S. (¶ 2.b); his brother and sister are dual U.S.-Australian citizens residing in the U.S. (¶ 2.c); his grandfather is a citizen and resident of Australia (¶ 2.d); his parents-in-law are citizens and residents of Austria (¶ 2.e); his wife's aunt is a citizen and resident of Austria employed by the Austrian government (¶ 2.f); he maintains a bank account in Austria (¶ 2.g); and he traveled to Austria at least eight times since July 2000 (¶ 2.h).

Applicant answered the SOR in writing on April 5, 2006, admitted the allegations, and elected to have the case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on July 11, 2006. A complete copy of the file of relevant material (FORM) was provided to Applicant, and he was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant received the FORM on July 24, 2006, but did not submit any additional material. The case was assigned to me on September 12, 2006.

FINDINGS OF FACT

Based on the entire record, I make the following findings of fact:

Applicant is a 25-year-old consultant for a federal contractor. He is a U.S. citizen by birth and an Australian citizen by virtue of his mother's citizenship. His mother resides in the U.S. His father is a native-born U.S. citizen. Applicant held temporary clearances while working as a summer intern in the U.S. Embassy in Japan during the summers of 2000 and 2001. His internships occurred while his father, a civil service employee, was assigned to the embassy.

Applicant graduated from college in the U.S. in May 2003, with a bachelor's degree in economics. He was married to an Austrian citizen, who resides with him in the U.S., in August 2003. When they were married, he became a joint owner of his wife's bank account in Austria, which has a balance of about 1,000 euros. He began working for his current employer in November 2003.

Applicant's brother and sister are dual U.S.-Australian citizens, by virtue of their mother's Australian citizenship and their birth in the U.S. They both reside in the U.S. Applicant has weekly personal contact with his brother, monthly personal contact with his sister, and frequent email contact with both.

Applicant is not willing to renounce his Australian citizenship. He renewed his Australian passport in June 2000, and it will expire in June 2010. In response to DOHA interrogatories, he stated he contacted the Australian Embassy regarding surrender of his passport and was informed that, if he did so, he would be unable to visit Australia, where his elderly grandfather, aunt, uncle, and several cousins hold citizenship and reside. Based on that information, he chose not to surrender his passport. He and his grandfather exchange letters about once a month. Applicant provided no information about his grandfather's political, business, or social connections.

Applicant's mother-in-law and father-in-law are citizens and residents of Austria. He sees his parents-in-law about twice a year and has daily contact by email and telephone. He has provided no information about the political, business, or social connections of his spouse or his in-laws.

Applicant has visited Austria at least eight times since July 2000. Several trips also included visits to other countries. All visits were for pleasure rather than business.

Applicant's spouse's aunt is employed by the Austrian government in the Office of the Chancellor, where she instructs other employees on use of computers and software. He has no contact with her.

Australia is a democracy, with a constitution patterned partly on the U.S. Constitution. It has an advanced market economy and is an active trading partner of the U.S. It has participated actively in international affairs since World War I and has fought beside the U.S. and other Allies in every significant armed conflict to the present day. The U.S. and Australia have exceptionally strong and close relations, based on similarities in culture and historical background and shared democratic values. Their friendship has been reinforced by the wide range of common interests and similar views on most international questions.

Austria is a parliamentary democracy. It was occupied after World War II. In May 1955, the occupation ended and Austria was recognized as an independent and sovereign state. In October 1955, it declared its perpetual neutrality, and it has declined to join any military alliances or to permit establishment of any foreign military bases in the country. Austrian leaders have emphasized its role as a moderator between industrialized and developing countries. Austria is active in the United Nations and peacekeeping missions. It also has been active in bridge-building between eastern Europe and the states of the former Soviet Union. Although remaining neutral, Austria's political leaders recognize and appreciate the U.S.'s support of the country's independence and reconstruction after World War II.

Austria is an active trading partner of the U.S. and is a member of the European Union (EU). Expansion of trade and investment in new EU members in central and eastern Europe is a major element of Austrian economic activity.

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 occupy a position . . . that will give that person 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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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).

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through 6.3.6.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information. However, the decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It 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 which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3; *see* Directive ¶ E3.1.15. 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; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline C (Foreign Preference)

When an applicant acts in such a way as to indicate a preference for a foreign country over the U.S., he or she may be prone to provide information or make decisions that are harmful to the interests of the U.S. Directive ¶ E2.A3.1.1. A disqualifying condition may arise if an individual exercises dual citizenship (DC 1), or possesses or uses a foreign passport (DC 2). Directive ¶¶ E2.A3.1.2.1, E2.A3.1.2.2.

Dual citizenship standing alone is not sufficient to warrant an adverse security clearance decision. ISCR Case No. 99-0454 at 5, 2000 WL 1805219 (App. Bd. Oct. 17, 2000). Under Guideline C, "the issue is not whether an applicant is a dual national, but rather whether an applicant shows a preference for a foreign country through actions." ISCR Case No. 98-0252 at 5 (App. Bd. Sep. 15, 1999). The act of obtaining a foreign passport is an exercise of dual citizenship. Applicant's application for and possession of an active Australian passport raises DC 1 and DC 2.

A security concern based on foreign preference can be mitigated (MC 1) by showing the dual citizenship is based solely on parents' citizenship. Directive ¶ E2.A3.1.3.1. MC 1 applies in this case.

A security concern under this guideline also can be mitigated when an applicant has expressed willingness to renounce dual citizenship (MC 4). Directive ¶ E2.A3.1.3.4. MC 4 is not established, because Applicant expressly stated his unwillingness to renounce his Australian citizenship.

When use of a foreign passport is involved, the clarifying guidance issued by the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (the "Money Memorandum") dated August 16, 2000, requires denial of a clearance unless the applicant surrenders the foreign passport or obtains official approval for its use from the U.S. Government. Applicant has declined to surrender his foreign passport and has not obtained official approval for its use.

When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. *See* ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3 (same debt alleged twice). SOR ¶ 1.a alleges Applicant exercised dual citizenship, and SOR ¶1.b. duplicates ¶ 1.a. by alleging the means by which he exercised dual citizenship, i.e., by possessing a foreign passport. To resolve this unnecessary multiplication of allegations, I resolve SOR ¶ 1.a. in Applicant's favor.

Guideline B (Foreign Influence)

The concern under Guideline B is that a security risk may exist when an applicant's immediate family, or other persons to whom he or she may be bound by affection, influence, or obligation, are not citizens of the U.S. or may be subject to duress. "These situations could create the potential for foreign influence that could result in the compromise of classified information." Directive ¶ E2.A2.1.1. A disqualifying condition (DC 1) may arise when "[a]n immediate family member [spouse, father, mother, sons, daughters, brothers, sisters], 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." Directive ¶ E2.A2.1.2.1.

"[T]here is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse." ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at * 8 (App. Bd. Feb. 20, 2002). The evidence indicates Applicant has regular and frequent contact with his parents-in-law. Thus, I conclude the presumption is not rebutted.

A disqualifying condition (DC 2) also may arise when an applicant is "[s]haring living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists." Directive ¶ E2.A2.1.2.2. Where the cohabitant is also an immediate family member under DC 1, both disqualifying conditions may apply. Both DC 1 and DC 2 are raised in this case.

A disqualifying condition (DC 3) also may arise if an individual has relatives "who are connected with any foreign government." Directive ¶ E2.A2.1.2.3. DC 3 is raised by evidence that Applicant's wife's aunt is employed by the Austrian government.

Family ties with persons in a foreign country are not, as a matter of law, automatically disqualifying under Guideline B. However, such ties raise a prima facie security concern sufficient to require an applicant to present evidence of rebuttal, extenuation or mitigation sufficient to meet the applicant's burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance. *See* Directive ¶ E3.1.15; ISCR Case No. 99-0424, 2001 DOHA LEXIS 59 (App. Bd. Feb. 8, 2001). The totality of an applicant's family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003).

A security concern (DC 8) can be raised by "[a] substantial financial interest in a country" that could make an applicant vulnerable to foreign influence." Directive ¶ E2.A2.1.2.8. I conclude DC 8 is not raised. Applicant's joint bank account worth about 1,000 euros is not "substantial" enough to make him vulnerable to foreign influence. He is a college graduate who has been gainfully employed by a federal contractor for almost three years. Even if DC 8 were raised, it would be mitigated, because his "[f]oreign financial interests are minimal and not sufficient to affect the individual's security responsibilities." Directive ¶ E2.A2.1.3.5. I resolve SOR ¶ 2.g. in Applicant's favor.

Since the government produced substantial evidence to raise DC 1, DC 2, and DC 3, the burden shifted to Applicant to produce evidence 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 is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

In cases where an applicant has immediate family members who are citizens or residents of a foreign country or who are connected with a foreign government, a mitigating condition (MC 1) may apply if "the immediate family members, cohabitant, or associate(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." Directive ¶ E2.A2.1.3.1.

Notwithstanding the facially disjunctive language of MC 1("agents of a foreign power **or** in a position to be exploited"), it requires proof "that an applicant's family members, cohabitant, or associates in question are (a) not agents of a foreign power, **and** (b) not in a position to be exploited by a foreign power in a way that could force the applicant to chose between the person(s) involved and the United States." ISCR Case No. 02-14995 at 5 (App. Bd. Jul. 26, 2004).

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004). Although Australia and Austria historically have been regarded as friendly to the U.S., the distinctions between friendly and unfriendly governments must be made with caution. Relations between nations can shift, sometimes dramatically and unexpectedly.

Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. *See* ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Nevertheless, the nature of a nation's government, its relationship with the U.S., and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence operations against the U.S.

With the exception of Applicant's spouse's aunt, none of his in-laws or extended family are agents of a foreign power. While the aunt does not meet the statutory definition of an agent of a foreign power, she is an employee of a foreign government, which is sufficient to bring her under the Appeal Board's broad definition of the term.[(1)]

Applicant's brother and sister were born in the U.S. and reside in the U.S. They derived their dual citizenship solely by virtue of their mother's Australian citizenship. There is no allegation in the SOR and no evidence in the record that they have exercised their Australian citizenship or taken any action to indicate a foreign preference. *See* ISCR Case No. 99-0454 at 5, 2000 WL 1805219 (App. Bd. Oct. 17, 2000) (dual citizenship standing alone not a disqualifying condition). I resolve SOR ¶ 2.c in favor of Applicant.

Applicant has provided no information about the political, business, or social connections of his mother, spouse, grandfather, or parents-in-law. While Australia is a staunch ally of the U.S., Austria has maintained its neutrality and is a hub of political and economic activity among the countries in Eastern Europe and the former states of the Soviet Union. After considering the lack of information submitted by Applicant regarding his foreign family ties and considering those ties individually as well as in totality, I conclude he has not carried his burden of establishing the second prong of MC 1.

A mitigating condition (MC 3) may apply if "[c]ontact and correspondence with foreign citizens are casual and infrequent." Directive ¶ E2.A2.1.3.3. It appears that Applicant has little or no contact with his spouse's aunt. I conclude MC 3 is established for the spouse's aunt, and I resolve SOR ¶ 2.f in Applicant's favor.

Foreign travel is not an enumerated disqualifying condition under this guideline. Applicant made three trips to Austria, one of which occurred in connection with his marriage. Many of his travels were to other foreign countries. I conclude his foreign travel has no independent security significance, and I resolve SOR ¶ 2.h in his favor.

"Whole Person" Analysis

In addition to considering the specific disqualifying and mitigating conditions under each guideline, I have also

considered the general adjudicative guidelines in the Directive ¶ E2.2.1. I have considered: (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 applicant'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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

Although all of Applicant's immediate family resides in the U.S., he has strong family ties to his Australian mother and grandfather, as well as his Austrian spouse and in-laws. He has taken active steps to exercise his dual citizenship. His continued possession of an Australian passport is directly related to his family ties to Australia, and it disqualifies him from holding a security clearance.

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 not mitigated the security concerns based on foreign influence and foreign preference. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him a security clearance.

FORMAL FINDINGS

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

Paragraph 1. Guideline C (Foreign Preference): AGAINST APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: Against Applicant

Paragraph 2. Guideline B (Foreign Influence): AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: For Applicant

Subparagraph 2.d: Against Applicant

Subparagraph 2.e: Against Applicant

Subparagraph 2.f: For Applicant

Subparagraph 2.g: For Applicant

Subparagraph 2.h: For 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 Applicant a security clearance. Clearance is denied.

LeRoy F. Foreman

Administrative Judge

1. The Appeal Board has declined to reexamine its broad definition of "agent of a foreign power," but it has not addressed the applicability of 50 U.S.C. § 438(6), which expressly applies the definitions in 50 U.S.C. § 1801(b) to security clearance determinations, nor has it addressed the

significance of Executive Order 12968, § 1.1(f), which adopts the definition in 50 U.S.C. § 1801(b) for federal employees seeking security clearances. *See* ISCR Case No. 03-10954 at 7-8 (App. Bd. Mar. 8, 2006).