**DEPARTMENT OF DEFENSE**
**DEFENSE OFFICE OF HEARINGS AND APPEALS**

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| In the matter of: | ) | |
| | ) | |
| ---------- | ) | ISCR Case No. 07-04481 |
| SSN: ---------- | ) | |
| | ) | |
| Applicant for Security Clearance | ) | |

## Appearances

For Government: Gina Marine, Esq., Department Counsel
For Applicant: *Pro Se*

September 24, 2008

## Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant submitted an Electronic Questionnaire for Investigations Processing on January 30, 2006, from which a Questionnaire for Sensitive Positions (SF 86) was prepared on or about March 6, 2006.[1] On June 9, 2008, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline C that provided the basis for its decision to deny him a security clearance and refer the matter to an administrative judge. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense as of September 1, 2006.

[1]The government submitted as Exhibit 1 the March 6, 2006, SF 86. Attached to the SF 86 was the signature form for an e-QIP dated January 30, 2006.

Applicant submitted an undated response to the SOR that was received by DOHA on July 7, 2008. Applicant requested a hearing before a DOHA administrative judge. On July 24, 2008, the case was assigned to me to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for him. On July 28, 2008, I scheduled a hearing for August 27, 2008. The parties appeared as scheduled. Three government exhibits (Ex. 1-3) were admitted. Applicant and two witnesses testified on his behalf, as reflected in a transcript (Tr.) received by DOHA on September 5, 2008. Based on review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

## Findings of Fact

DOHA alleged under Guideline C, foreign preference, that Applicant, a U.S. native citizen, acquired United Kingdom (U.K.) citizenship in about January 2005 (SOR ¶ 1.a) for potential future benefits (SOR ¶ 1.c), and that he has lived in the U.K. since about 1997 (SOR ¶ 1.b). Applicant admitted the allegations. After considering the evidence of record, I make the following findings of fact.

Applicant is a 45-year-old expert in artificial intelligence who has worked for a U.S. defense contractor (company X) since May 1996.[2] For most of that time, he has performed his duties as a self-employed consultant. In about August 2007, he became a direct employee of the company on a half-time basis.[3] Company X requests that he be granted a secret security clearance so that his expertise in artificial intelligence can be fully utilized in its defense projects (Tr. 13).

Applicant was born in the U.S. to U.S. native citizens in May 1963. In August 1991, he earned his doctorate degree from a public university in the U.S. He was employed as a graduate research assistant at the university beginning in January 1986. After he earned his doctorate, he stayed on as an associate professor at the university. In 1996, he was given tenure, and he began independent consulting on the side as an expert in the field of artificial intelligence with company X. Recruited by a U.K. university, he took a sabbatical from his academic position with the U.S. university, and moved to the U.K. in about July 1997 (Ex. 1, Tr. 45, 50).

After he arrived in the U.K., he accepted employment as a senior research fellow at the U.K. university. Applicant thought it would be interesting to live in a foreign country and the position was related to his academic research (Tr. 44-46). He continued to consult for the U.S. defense contractor. Applicant subsequently incorporated in the

[2]The SF 86 of record indicates Applicant started consulting for the company in May 1996 (Ex. 1). The company's president/CEO and the FSO both testified that Applicant started consulting with the firm in 1994 (Tr. 13, 28).

[3]The president/chief executive officer of company X testified that as a half-time employee, Applicant spends 50 percent of his time on their project. About eight to ten days on average per month, Applicant works at company X's facility in the U.S. He also does some work for the company in the U.K. (Tr. 15-16).

U.S. in January 2004, after another U.S. company would not pay him as a private Schedule C contractor. He remained the sole employee of his business, but thereafter his earnings were paid into the corporation (Tr. 55). Initially he used his U.K. address for the corporate address (Ex. 1). He recently changed it to his parents' address in the U.S. because it caused problems for a major U.S. defense contractor for which Applicant was also consulting (Tr. 56-57).

Applicant resided in university-provided housing in the U.K., which was located about two hours from the airport (Tr. 46). He acquired permanent residency, and a year after he was eligible, he applied for U.K. citizenship (Tr. 63) for medical benefits under the national healthcare system primarily and in case he retires there (Ex. 2). He acquired U.K. citizenship about nine months later, in January 2005 (Ex. 1, Ex. 2, Tr. 48, 62). He had to provide his U.S. passport, his work permit in the U.K., and proof of U.K. residency, had to pay the equivalent of what would now be $700 USD, and had to affirm allegiance to the queen and to certain principles of the U.K. (Tr. 72-74). Applicant took no steps to acquire a U.K. passport and continued to travel on his U.S. passport (Ex. 2, Ex. 3). He traveled extensively back to the U.S. to consult for company X (Tr. 46).

After more than seven years there, Applicant left the U.K. university in May 2005 (Ex. 1). In July 2005, Applicant accepted an academic position as a senior researcher on a part-time basis (one day per week) at another U.K. university that was more centrally located (Ex. 1). He had made contacts there through his research and wanted to be closer to the airport (Tr. 46). He continued his independent consulting, for company X as well as for several other companies.

On January 30, 2006, Applicant executed an e-QIP in application for a secret clearance for his work with company X. A SF 86 was subsequently prepared on March 6, 2006, from information Applicant provided. He listed his dual citizenship with the U.S. and the U.K. "for about three years." He denied any intent to ever hold a U.K. passport. Applicant disclosed his employments with the U.K. universities, and his residency in the U.K. since July 1997. Applicant responded "Yes" to question 17A concerning any foreign property, business connections, or financial interests, citing his employment in academia in the U.K. He responded negatively to question 17B regarding whether he had been employed by or consulted with a foreign government, firm, or agency.

On December 21, 2006, Applicant was interviewed by a government investigator about his dual citizenship. Applicant explained that after years of working in the U.K., he decided to acquire U.K. citizenship because he thought he might want to retire in the U.K. in the future and would want medical benefits. Concerning the medical, voting, and retirement benefits available because of his U.K. citizenship, Applicant denied he had voted in a U.K. election, acquired a U.K. passport, performed any services for the U.K. government, sought or held an office in the U.K., or maintained any financial interests in the U.K. other than a bank account with about $14,000 USD on deposit. In contrast, he had about $210,000 USD in US assets. Applicant indicated he had paid taxes in the U.K. He expressed his willingness to renounce his U.K. citizenship as a condition of access, and claimed sole loyalty to the U.S. Applicant discussed his contacts with U.K.

nationals, which was on the order of once a year with the exception of a female friend whom he contacted once every three weeks (Ex. 2).

In about August 2007, Applicant became an employee of company X on a half-time basis (Ex. 2). He continued to reside in the U.K. in a rental unit. Due to Applicant's unique capabilities in the field of artificial intelligence, Company X wanted him to become a full-time employee but Applicant preferred to also continue his research in the U.K. (Tr. 15). The company owns the intellectual property rights to Applicant's work product that it did not have when he worked as an independent contractor (Tr. 20). By acquiring employee status Applicant committed to refrain from working with anyone else in the same areas as his work at company X (Tr. 20-21). Applicant has since spent about two out of every five weeks at company X's facility in the U.S. (Tr. 67), where he is a group leader, supervises another employee, and manages a project (Tr. 15-17, 29, 34). Applicant also performs work for company X in the U.K. but it does not involve information that is restricted by international trade in armament regulations (ITAR) (Tr. 19). The company has not found Applicant's U.K. residency to be a problem. To the contrary, it has benefitted from research in the U.K. that Applicant has access to (Tr. 21).

On April 29, 2008, Applicant responded to DOHA interrogatories concerning any acquisition by him of a U.K. passport, any international travel since August 2004, any entry into the U.K. as a citizen of the U.K., any acceptance of benefits of his foreign citizenship, and any voting in a foreign election. Applicant provided copies of two U.S. passports: a U.S. passport issued by the U.S. Embassy in the U.K. in November 1999 and valid for ten years, and a second passport issued by the U.S. State Department outside of the U.S. in March 2008 valid for only one year (apparently because he ran out of pages in his current U.S. passport). Applicant indicated he had not acquired a U.K. passport and he denied any intent to acquire one as he had a permanent resident stamp from the U.K. in his U.S. passport. He indicated that since August 2004, he had traveled to Germany for pleasure in 2006, to Brazil in 2008 to speak at a conference, and several times between the U.S. and the U.K. for company X business and to visit his family in the U.S. Applicant denied ever voting in the U.K. but admitted that he received national healthcare benefits from the U.K. including prescription medications. Although he remained a U.K. resident, he denied it was to meet citizenship requirements. In response for further facts that he believed might assist in determining his security clearance suitability, Applicant stated: "I only took UK citizenship for potential future benefits (e.g., healthcare). I do not intend to get a UK passport ever. I consider my US citizenship primary." (Ex. 3).

Applicant informed company X that he intends to relocate to the U.S. from the U.K. in a few years (Tr. 19, 22). The company's president/CEO is hopeful Applicant will then work full-time for him (Tr. 19). He is aware Applicant has U.K. citizenship but is not concerned knowing his character and loyalty to the U.S. Applicant has been conscientious in handling company proprietary information (Tr. 24). The company's director of administration/facility security officer (FSO) has also known Applicant since he began consulting for the company. She is aware of his dual citizenship and that he

receives medical benefits in the U.K. but is not presently concerned since he does not have a U.K. passport (Tr. 31-32). Based on what he has told her, she understands that he wants to keep his options open about possibly retiring to the U.K. but he does not have any current plan to do so (Tr. 32). Concerning any exercise of his foreign citizenship, she advised him that "security doesn't like that too much and . . . that he could not have two passports because that's not allowed." (Tr. 36).

Applicant continues to have responsibilities at the U.K. university, since June 2007 only about three hours per week (Tr. 44, 47). He advises a couple of doctorate degree students and occasionally attends meetings to offer advice on the curriculum (Tr. 44). When Applicant is in the U.S. consulting for company X, he stays with a friend in the area (Tr. 30, 58). His parents reside in the U.S. in another state. His sister lives in Saudi Arabia with her family (Tr. 31, 69). Applicant's brother-in-law is employed by a foreign oil company (Tr. 70).

Applicant denies any affiliation with the U.K. government and he considers himself to be a loyal U.S. citizen. He thinks it "very likely" that he will have to move back to the U.S. in the next year or so because of the expense of living in the U.K., but he has enjoyed living and working in the U.K. ("I do love living there and it will break my heart to leave. . . ." Tr. 48). Applicant retains his U.K. citizenship for the option of possibly retiring to the U.K. in the future ("If I wanted to some day retire in England, I'm not sure that I would ever want to but if I wanted to, I could and I would have lifetime healthcare, amongst other possible social benefits, so it's just an open door." Tr. 48). Although not his preference, he asserts a willingness to renounce his U.K. citizenship if necessary for the clearance (Tr. 49, 64). As of August 2008, Applicant had taken no steps to renounce his foreign citizenship.

Applicant has a checking account in the U.K. with $6,000 USD on deposit as of August 2008 (Tr. 51-52). He uses that account for all of his general expenses (rent, groceries) in the U.K. (Tr. 53, 55). All of his retirement funds are in the U.S. (Tr. 52), and his earnings from his work for company X are deposited into a checking account in the U.S. (Tr. 54). Applicant receives mail in the U.S. at his parents' home, which is also his corporate address. He stays at his parents' home about three or four weeks a year (Tr. 58). When asked at his hearing for his address, Applicant gave that address in the U.S. rather than his U.K. address. Applicant pays federal and state income taxes, and corporate taxes in the U.S. He pays taxes in the U.K. on the money that he earns in the U.K. and on any money that he brings over into the U.K. (Tr. 59). Applicant does not own any real estate in the U.S. or in the U.K. (Tr. 60). Applicant has voted in the U.S. presidential elections and in some state elections since moving to the U.K. He is registered to vote in the state where his corporation is presently sited and where he receives his mail. Applicant has never registered to vote in the U.K. To his understanding, he does not have a pension stake in the U.K. from his affiliation with either university (Tr. 61).

Applicant has four close friends who live in the U.K. (Tr. 66), and has a girlfriend whom he has been dating since May 2008. She is a resident citizen of the U.K. (Tr. 49-

50). Applicant has several close friends in the U.S., including the friend with whom he regularly stays when he is working onsite at company X (Tr. 65).

Since about February 2008, Applicant has also consulted a couple days a week for a U.K. company that formed out of the university that employed him from July 1997 to May 2005. He had previously consulted for them, about one day every six months (Tr. 67). His income, invoiced to him as an independent consultant, is deposited directly into his bank account in the U.K. and is not paid into his corporation in the U.S. (Tr. 68). About 30 percent of his $100,000 USD annual income comes from U.K. sources (this consulting contract and his work at the university) (Tr. 69).

## Policies

When evaluating an Applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government reposes a high degree of trust and confidence in individuals to whom it grants access to

classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## Analysis

### Guideline C—Foreign Preference

When an individual acts in such a way as to indicate a preference for a foreign country over the U.S., then he or she may be prone to provide information or make decisions that are harmful to the U.S. (AG ¶ 9). A citizen of the U.S. from birth, Applicant moved to the U.K. in July 1997, initially while he was on sabbatical from a tenured academic position with a U.S. university. He accepted a senior research fellow position with a U.K. university, and has since lived there while continuing to consult with company X and other U.S. firms. In January 2005, he voluntarily acquired U.K. citizenship. Foreign preference security concerns are raised by any "action to acquire or obtain recognition of a foreign citizenship by an American citizen" (AG ¶ 10(b)). He also currently receives medical benefits under the U.K's national healthcare system. AG ¶ 10(a)(3), "exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to: (3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country" also applies.

The government's case for potential disqualification under AG ¶ 10(a)(4), "residence in a foreign country to meet citizenship requirements" is less persuasive, however. While Applicant had to prove legal residency as a precondition for U.K. citizenship, he did not remain in the U.K. for the purpose of establishing the residency required for citizenship. He has lived in the U.K. since 1997 because of academic opportunities, and more so of late, enjoyment of the lifestyle and environment. In the absence of any evidence that U.K. residency is required to maintain his U.K. citizenship, AG ¶ 10(a)(4) does not currently apply.

Applicant bears a substantial burden to overcome the implications of foreign preference raised by his voluntary acquisition of foreign citizenship. Although Applicant claims no particular affinity for the U.K. government, he affirmed allegiance to the queen and to abide by certain U.K. principles when he became a U.K. citizen. The U.S. government does not encourage its citizens to be dual nationals because of the complications that might ensue from obligations owed to the foreign country, and the

interests of even the closest of allies such as the U.S. and U.K. are not always completely aligned.[4]

AG ¶ 11(b), "the individual has expressed a willingness to renounce dual citizenship" applies, but it is entitled to less weight in mitigation if it is conditional. Applicant has consistently indicated that he would be willing to renounce his U.K. citizenship as a condition of access to classified information, but that he would prefer to retain U.K. citizenship to keep his future options open with respect to possibly retiring in the U.K. where he would be entitled to medical and perhaps other social benefits. Applicant has been on notice for some time that his foreign citizenship was of some concern to the Department of Defense. When he told company X's FSO that he had become a U.K. citizen, she informed him "security" does not approve of such conduct and that acquisition of a foreign passport was not allowed. He has never acquired a U.K. passport. However, his failure to take any steps toward renunciation of his U.K. citizenship after a government interview in December 2006 and the issuance of the SOR confirms his preference to remain a U.K. citizen. Applicant testified about his U.K. citizenship that it was not a big deal to him, that "it's a nicety." (Tr. 64). His inaction in the face of the government's concerns suggests otherwise.

[4]The government did not request that I take administrative notice of any particular facts concerning the U.K. or its relations to the U.S. The close relations shared by the U.S. and the U.K., both historically and currently, are well known. In its *Background Note: United Kingdom*, dated July 2008, the U.S. State Department states, in part:

> The United Kingdom is one of the United States' closest allies, and British foreign policy emphasizes close coordination with the United States. Bilateral cooperation reflects the common language, ideals, and democratic practices of the two nations. Relations were strengthened by the United Kingdom's alliance with the United States during both World Wars, and its role as a founding member of NATO, in the Korean conflict, in the Persian Gulf War, and in Operation Iraqi Freedom. The United Kingdom and the United States continually consult on foreign policy issues and global problems and share major foreign and security policy objectives.
>
> The United Kingdom is the fifth-largest market for U.S. goods exports after Canada, Mexico, Japan, and China, and the sixth-largest supplier of U.S. imports after Canada, China, Mexico, Japan, and Germany. U.S. exports of goods and services to the United Kingdom in 2006 totaled $92 billion, while U.S. imports from the U.K. totaled $93 billion. The United States has had a trade deficit with the United Kingdom since 1998. The United Kingdom is a large source of foreign tourists in the United States. In 2007, an estimated 3.1 million U.S. residents visited the United Kingdom, while 4.5 million U.K. residents visited the United States.
>
> The United States and the United Kingdom share the world's largest foreign direct investment partnership. U.S. investment in the United Kingdom reached $324 billion in 2005, while U.K. direct investment in the U.S. totaled $282 billion. This investment sustains more than 1 million American jobs.

## Whole Person Concept

Under the whole person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

> (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

Applicant affirms his primary loyalty is to the U.S., and his actions do not show any particular affinity for the U.K. government or political system. He has traveled exclusively on a U.S. passport and has never voted in a British election. Yet, the salient issue in the security clearance determination is not in terms of loyalty or allegiance, but rather what is clearly consistent with the national interest. *See* Executive Order 10865, Section 7. Despite considerable financial assets in the U.S., and company X's willingness to employ him full time in the U.S., Applicant has chosen to stay in the U.K. where he consults a couple days a week for a U.K. company, has a girlfriend, receives medical benefits, and clearly prefers living. He testified that it would "break his heart" should he have to return to the U.S. to live in the next few years for financial reasons. He was motivated to obtain his foreign citizenship to ensure his future availability for medical and perhaps other public benefits. His ongoing acceptance of, and continuing eligibility for, medical benefits in the U.K. makes him more likely to act in preference for the U.K. than he might otherwise as a citizen solely of the U.S., who is living and working in the U.K. Notwithstanding his record of appropriate handling of proprietary information for company X, I am unable to conclude at this time that it is clearly consistent with the national interest to grant Applicant access to classified information.

## Formal Findings

Formal findings on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

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| Paragraph 1, Guideline C: | AGAINST APPLICANT |
| Subparagraph 1.a: | Against Applicant |

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| Subparagraph 1.b: | Against Applicant |
| Subparagraph 1.c: | Against Applicant |

## Conclusion

In light of the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

ELIZABETH M. MATCHINSKI
Administrative Judge