DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 07-12163
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Jennifer I. Goldstein, Esq., Department Counsel
For Applicant: *Pro se*

June 23, 2008

Decision

FOREMAN, LeRoy F., Administrative Judge:

Applicant submitted his security clearance application on September 23, 2006. On February 12, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines C (Foreign Preference) and B (Foreign Influence). 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 for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on February 15, 2008; answered it on March 4, 2008; and requested a decision on the record without a hearing. DOHA received the request on March 6, 2008. Department Counsel submitted the government's written case on April 2, 2008. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the government's

evidence. Applicant responded to the FORM on May 2, 2008. His response was received at DOHA on May 6, 2008. The case was assigned to me on May 27, 2008. Eligibility for access to classified information is denied.

Evidentiary Ruling

The FORM did not contain any information about France, the country referred to in the SOR. On May 28 I notified Department Counsel and Applicant that I intended to take administrative notice of relevant adjudicative facts about France, based on two documents issued by the U.S. Department of State. My notifications are attached to the record as Hearing Exhibits (HX) I and II. Neither party objected. Their responses are attached as HX III and IV. The documents on which I have taken administrative notice are attached as HX V and VI. The facts administratively noticed are set out below in my Findings of Fact.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a, 1.b, 1.d, 1.e, and 1.f, and he partially admitted ¶ 1.c. He admitted all the allegations in SOR ¶ 2, but explained that his "girlfriend" is now his fiancée, and they will be married in November 2008. His admissions in his answer to the SOR are incorporated in my findings of fact. I make the following findings:

Applicant was born in April 1981 in the U.S. of French parents. His father was working in the U.S. for a U.S. corporation at the time of his birth. His family lived in the U.S. from 1981 to 1982, moved back to France for a year, lived in the U.S. from 1983 to 1986, in France from 1986 to 1990, in the U.S. from 1991 to 1995, and in France from 1995 to the present.

Applicant worked in the U.S. as an intern during the summer of 2003, and lived in France from September 2003 to September 2006, when he returned to the U.S. He attended college and obtained two master's degrees in France. He is now enrolled in a doctoral program school in the U.S., studying policy analysis, and is employed as a doctoral fellow by a federal contractor. He maintains regular email contact with several friends and former classmates in France. He told a security investigator he intends to remain in the U.S. He maintains a bank account in France to enable his parents to repay his student loans in France. As of January 2007, he had about $400 in the account. He has no other property or assets in France.

Applicant's parents, two brothers, and his sister-in-law are citizens and residents of France. His father retired in August 2006 after working more than 40 years for a U.S. company. His mother is a retired physical therapist. One brother works as a technical director for a private television network, and the other as a medical products salesman. His sister-in-law is self-employed as a speech therapist. His fiancée is a citizen and resident of France and is a college student. His fiancée's father works at the French Ministry of Agriculture, where he manages pension funds for the agricultural industry.

The occupations of Applicant's friends, classmates, and colleagues with whom he maintains contact in France are not reflected in the record, but none of them are connected to the French government or any other foreign government.

Applicant has held a French passport since he was a child. He obtained a U.S. passport as an adult. He visits his family in France regularly. He uses his French passport to enter France and his U.S. passport to reenter the U.S. He usually uses his U.S. passport for other foreign travel, but he used his French passport to visit Turkey because immigration agreements between Turkey and Europe made it easier to enter and exit Turkey with a French passport. Applicant has stated his willingness to surrender his French passport, but there is no evidence in the record indicating he has done so.

I have taken administrative notice of the following facts about France. France is a multiparty constitutional democracy. The president is elected by popular vote. There is a bicameral parliament, with the upper house (Senate) indirectly elected through an electoral college and the lower house (National Assembly) directly elected. France is America's oldest ally. It plays an influential global role as a permanent member of the UN Security Counsel, NATO, and other multilateral institutions. It is one of NATO's top five troop contributors. Relations between the U.S. and France are active and friendly. France is a close partner with the U.S. in the war on terror. At times, France and the U.S. have disagreed on major issues. For example, France withdrew its military forces from NATO in 1966, and it opposed the use of force in Iraq in March 2003 and did not join the U.S.-led military coalition. Trade and investment between the U.S. and France are strong, and the U.S. is the largest foreign investor in France. The French government generally respects the human rights of its citizens, but there have been problems in some areas, including overcrowded and dilapidated prisons, lengthy pretrial detention, and protracted investigation and trial proceedings.

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 have 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 criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's over-arching adjudicative goal is a fair, impartial and common

sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. 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 that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. 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* AG ¶ 2(b).

Analysis

Guideline C, Foreign Preference

The SOR alleges Applicant exercises dual citizenship with France and the U.S. (SOR ¶ 1.a); he possesses a French passport (SOR ¶ 1.b); he uses his French passport to enter and exit France (SOR ¶ 1.c), he has traveled to France between December 2006 to January 2007, in March 2007, and between August and September 2007 (SOR ¶ 1.d); he has stated his intention to renew his French passport (SOR ¶

1.e); and he used his French passport instead of his U.S. passport to enter and exit Turkey in at least 2002, 2004, and 2005.

The concern under Guideline C is as follows: "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." 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). AG ¶ 9.

A disqualifying condition may arise from "exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen," including but not limited to "possession of a current foreign passport." AG ¶ 10(a)(1). Applicant's possession and use of a French passport raises this disqualifying condition, shifting the burden 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 never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns under this guideline may be mitigated by evidence that "dual citizenship is based solely on parents' citizenship or birth in a foreign country." AG ¶ 11(a). This condition is established.

Security concerns under this guideline also may be mitigated by if "the individual has expressed a willingness to renounce dual citizenship." AG ¶ 11(b). This condition is established by Applicant's statement to a security investigator that he would be willing to relinquish his French citizenship if necessary to obtain a clearance.

Finally, security concerns based on possession or use of a foreign passport may be mitigated if "the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated." AG ¶ 11(e). This condition is not established. Although Applicant has stated his willingness to surrender or destroy his French passport, he has presented no evidence he has done so.

Guideline B (Foreign Influence)

The SOR alleges Applicant's mother, father, two brothers, a sister-in-law, his girlfriend (now his fiancée), and many friends, former classmates, and work associates are citizens and residents of France (SOR ¶¶ 2.a, 2.b, and 2.c). It also alleges he maintains a French checking account (SOR ¶ 2.d).

The concern under this guideline is set out in AG ¶ 6 as follows:

> Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

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).

Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. For example, the U.S. and France disagreed over the use of military force in Iraq.

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.

A disqualifying condition under this guideline may be raised by "contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion." AG ¶ 7(a). 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). AG ¶ 7(a). A disqualifying condition also may be raised by "connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information." AG ¶ 7(b). Finally, a security concern may be raised by "a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated

business, which could subject the individual to heightened risk of foreign influence or exploitation." AG ¶ 7(e).

Applicant's multiple family and social ties are sufficient to raise AG ¶¶ 7(a) and (b), but his small bank account is insufficient to raise AG ¶ 7(e). His travel to France was for the purpose of visiting his family and fiancée, and it has no independent security significance.

Security concerns under this guideline can be mitigated by showing that "the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S." AG ¶ 8(a). Applicant has close family and social ties in France, and his future father-in-law is a French government official, albeit not connected with military or international issues. France is a friend and ally of the U.S., but it has disagreed with the U.S. on major policy issues, most recently on the use of military force in Iraq. Applicant's work in policy analysis makes him an attractive target for foreign influence. Considering the totality of his foreign relationships, I conclude AG ¶ 8(a) is not established.

Security concerns under this guideline also can be mitigated by showing "there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest." AG ¶ 8(b). This mitigating condition is not established, because Applicant has deep and longstanding relationships and loyalties in both countries.

Security concerns under this guideline also may be mitigated by showing that "contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation." AG ¶ 8(c). Applicant's contacts with his family and fiancée are neither casual nor infrequent.

Whole Person Concept

Under the whole person concept, an 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. An 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept.

After weighing the disqualifying and mitigating conditions under Guidelines C and B, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on foreign preference and foreign influence. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25 of Enclosure 3:

Paragraph 1, Guideline C (Foreign Preference):	AGAINST APPLICANT
Subparagraphs 1.a, 1.b, 1.c, 1.e, and 1.f:	Against Applicant
Subparagraph 1.d:	For Applicant
Paragraph 2, Guideline B (Foreign Influence):	AGAINST APPLICANT
Subparagraphs 2.a-2.c:	Against Applicant
Subparagraph 2.d:	For Applicant

Conclusion

In light of all of the circumstances presented by 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.

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LeRoy F. Foreman
Administrative Judge