



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



In the matter of: )  
)  
) ISCR Case No. 07-12547  
)  
Applicant for Security Clearance )

**Appearances**

For Government: John Bayard Glendon, Esquire, Department Counsel  
For Applicant: *Pro Se*

August 29, 2008

**Decision**

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the government’s security concerns under Guideline C, Foreign Preference. Applicant’s eligibility for a security clearance is denied.

On June 5, 2008, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline C. 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 answered the SOR in writing on June 15, 2007, admitted all of the allegations, and requested a hearing before an Administrative Judge. The case was assigned to me on July 18, 2008. DOHA issued a notice of hearing on July 25, 2008, and I convened the hearing as scheduled on August 21, 2008. The government offered Exhibits (GE) 1 through 10, which were admitted without objection. Applicant testified

and submitted Exhibit (AE) A through BB. Department Counsel objected to all of the documents except B, L, N, Q, Y, AA and BB on the basis of relevance.<sup>1</sup> I overruled the objection and the documents were admitted. DOHA received the transcript of the hearing (Tr.) on August 27, 2008.

### **Findings of Fact**

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 56 years old and has worked for a federal contractor since February 2006. He was born in Australia and graduated from college there. He came to the U.S. in 1985 on a work visa and obtained a green card in 1988. He has resided in the U.S. since 1985. In 1991 he earned a master's degree from an American university. He married a U.S. citizen in 1996 and became a naturalized U.S. citizen in 2002. He explained the reason it took so long was because at the time the waiting period was between eight and ten years.<sup>2</sup> Shortly after becoming a U.S. citizen he obtained a U.S. passport. He retained his active Australian passport and used it to travel to Australia in 2006. He used his Australian passport "because I could pass quicker as an Australian. Because I am a citizen, yeah."<sup>3</sup>

Applicant has a bank account in Australia that he maintained since 1985. He had at one time approximately \$22,000 U.S. dollars in it for his niece and nephew's educational expenses. This money was revenue from an apartment he owned there and sold in 2004. He has since transferred the money for educational expenses for his niece and nephew and the account has about a \$15 balance. He paid both Australian and U.S. taxes on his investment property. He has no other assets located in Australia. He has approximately \$1 million in assets in the U.S.<sup>4</sup>

Applicant is entitled to a pension in Australia because of his employment while he lived there. He would receive this pension regardless of what his citizenship status is and whether he retires in the U.S. or Australia. It might be subject to a means test. He would also be entitled to U.S. social security. Although the Australian pension is not contingent on his location, Applicant wants to keep his Australian citizenship just in case there is an issue. He did not anticipate this would be an issue until the distant future. He considers the Australian pension as "purely a safety net for myself and my wife." He stated "my concern with the pension has always been really to take [care of] my wife so

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<sup>1</sup> Many of the documents presented by Applicant were press releases, joint communiqués and other articles. I considered all of the documents Applicant presented and gave it the appropriate weight in accordance with the factual issues important to the case.

<sup>2</sup> Tr. 40-45.

<sup>3</sup> Tr. 37-38.

<sup>4</sup> Tr. 41-44, 55, 58.

that she could return to Australia. I always thought that I would only ever be eligible for an Australian pension if I returned to Australia, which I don't see that happening." He went on to say that the reason for retaining his Australian citizenship was "sentimental reasons."<sup>5</sup>

Applicant considers himself a dual citizen of Australia and the United States. He acknowledged he took an oath of allegiance to the U.S. when he became a citizen. He stated he takes that oath seriously and he accepts his obligation to the U.S. above all others. He also read the oath that says he renounced and abjure absolutely and entirely all allegiance to any foreign principal, state, or sovereign, to which he was a subject or citizen. Applicant went on to explain "My point is that this actually shows that I am primarily a U.S. citizen, even though I was born in Australia."<sup>6</sup> Applicant then clearly stated he is not willing to renounce his Australian citizenship.<sup>7</sup> He uses his Australian passport to enter and exit Australia. This is a requirement for Australian citizens. He stated: "Regarding the Australian passport, I'm actually required; I cannot have my passport destroyed because the Australian government requires that I must have a passport when in Australia. As an Australian citizen, I can not have a strange passport, I cannot use a U.S. passport when in Australia, and I cannot obtain a visa to Australia."<sup>8</sup> When questioned, Applicant admitted that the reason he has to use his Australian passport is because he claims citizenship there. If he was not claiming Australian citizenship, he would be permitted to use his American passport.<sup>9</sup> He went on to say "I want to keep my dual citizenship, yes."<sup>10</sup>

In answering interrogatories Applicant stated he was willing to perform military service or bear arms for Australia.<sup>11</sup> He believes he must abide by the Australian laws and if they were to go to war and he was required to serve in the military he would do as required because he is a citizen of Australia. If fighting a war is a requirement of his Australian citizenship then he will abide by the requirement because of his citizenship status. He believes this is consistent with his U.S. citizen status because the two countries are allies. In the unlikelihood he would have to choose between Australia and

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<sup>5</sup> Tr. 36-37, 48-53; AE R.

<sup>6</sup> Tr.29-30.

<sup>7</sup> Tr. 30-31.

<sup>8</sup> Tr. 31.

<sup>9</sup> Tr. 32.

<sup>10</sup> Tr. 35.

<sup>11</sup> GE 2, question 26, Tr. 56.

the U.S. his response was “I would probably have to bear arms for the U.S.”<sup>12</sup> Appellant understands that he does not have to be a dual citizen, but that he chooses to be.<sup>13</sup>

Applicant traveled to Australia in 2006 for three months as a requirement of his job. He used his Australian passport to enter and exit the country. He used his U.S. passport to exit the U.S. and return. Although he does not have any current plans to visit Australia he can not rule it out. Applicant has surrendered his Australian passport to his security manager. He stated it can not be destroyed because as a dual citizen he will need it to gain entry into Australia.<sup>14</sup> Therefore, he will retain it and use it for any trips he may take to Australia in the future. When Applicant travels any place outside the U.S. except Australia, he uses his U.S. passport. Applicant has made up his mind and does not intend on retiring to Australia.

Applicant has not voted in Australia since 1999. He has voted in all elections and primaries in the U.S. since becoming a citizen.<sup>15</sup> Applicant considers himself an Australian citizen and bound by its laws.

### **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 over-arching 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

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<sup>12</sup> Tr. 56-59.

<sup>13</sup> Tr. 60.

<sup>14</sup> Tr. 35-36.

<sup>15</sup> Tr.55.

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**

Under AG ¶ 9 the security concern involving foreign preference arises: 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.

AG ¶ 10 describes conditions that could raise a security concern and may be disqualifying: I have specifically considered AG ¶ 10 (a) (“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: (1) possession of a current foreign passport; (2) military service or a willingness to bear arms for a foreign country... (5) using foreign citizenship to protect financial or business interests in another country”) and (b) (“action to acquire or obtain recognition of a foreign citizenship by an American citizen.”) Applicant maintains an active Australian passport and uses it when he travels there. He considers himself a dual citizen and acknowledges he is bound by Australian laws. Applicant continued to use his Australian passport after becoming a U.S. citizen. He acknowledges that if he did not consider himself an Australian citizen and renounced that status, he would be permitted to enter Australia

on his U.S. passport. Instead because he maintains his citizenship with Australia he must comply with the entry and exit laws and all other laws. Applicant admitted that as an Australian citizen if he was required to serve in the Australian military he would do so. Finally, although he stated that he does not have to be a citizen of Australia to collect certain pension rights, he wants to ensure he maintains his citizenship as a safety net for his pension. I find all of the above disqualifying conditions apply.

I have considered all of the mitigating conditions under AG ¶ 11 and especially considered (a) (“dual citizenship is based solely on parents’ citizenship or birth in a foreign country”); (b) (“the individual has expressed a willingness to renounce dual citizenship”) and (e) (“the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.”) Applicant’s dual citizenship is not based solely on his birth in Australia. Although he was born in Australia, since he became a U.S. citizen he used his Australian passport and has exercised his rights and obligations as an Australian citizen. He has exercised his Australian citizenship by choice, thereby negating the application of (a). Applicant is not willing to renounce his Australian citizenship, and has made a conscious decision not to because he wants to maintain any rights he may have in that country. Hence, I find (b) does not apply. Applicant has surrendered his passport to the cognizant security authority. His actions have met the specific language of the mitigating condition, but not the spirit of it because he intends to retrieve the passport when he travels to Australia. Again, as an Australian citizen he is required to enter and exit the country on that passport. So although (e) applies, it is not enough to overcome the other facts of his Australian citizenship status because his surrender is conditioned upon it being returned to him when he wants to travel to Australia.

### **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) 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a naturalized U.S. citizen who wants to retain his dual citizenship status with Australia. He has used his Australian passport after becoming a U.S. citizen to enter and exit that country because

it is required of its citizens by Australia. Applicant is unwilling to renounce his citizenship with Australia and does not want to affect any potential rights he may have there. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from Foreign Preference.

### **Formal Findings**

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

Paragraph 1, Guideline C:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant

### **Conclusion**

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

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Carol G. Ricciardello  
Administrative Judge