DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
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	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Kathryn D. MacKinnon, Esquire, Department Counsel
For Applicant: William Savarino, Esquire

September 21, 2011

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Statement of Case

On September 17, 2010, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on October 22, 2010, and requested a hearing. Department Counsel filed an amendment to the SOR on February 7, 2011. Applicant responded to the amended SOR on March 9, 2011.

The case was assigned to another judge and reassigned to me on April 5, 2011. The case was scheduled for hearing on April 15, 2011. A hearing was held as scheduled, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, or deny Applicant's application for a security clearance. At hearing, the Government's case consisted of eight exhibits (GEs 1-8); Applicant relied on seven witnesses (including himself) and seven exhibits (AEs A-G). The transcript (Tr.) was received April 25, 2011.

Besides his seven exhibits, Applicant requested administrative notice of six documents: *White House Press Release, Remarks by President Obama and Prime Minister Gillard of Australia* (March 7, 2011); *U.S.-Australia Relations, Prime Minister Gillard's Address to U.S. Congress* (March 11, 2011); American forces Press Release, *U.S.-Australian Alliance Never More Important* (November 7, 2010); *U.S. Central Command, Support to the Global War on Terror* (April 14, 2011); *Background Note: Australia,* U.S. Department of State (November 24, 2010); and *Security Treaty Between Australia, New Zealand, and the United States* (Australian Treaty Series 1952 No. 2, 1997).

Administrative or official notice is the appropriate type of notice used for administrative proceedings. *See* ISCR Case No. 05-11292 (App. Bd. April 12, 2007); ISCR Case No. 05-11292 (App. Bd. April 12, 2007). Administrative notice is appropriate for noticing facts or government reports that are well known. *See Stein*, Administrative Law, Sec. 25.01 (Bender & Co. 2006). For good cause shown, administrative notice was granted with respect to the above-named background reports addressing the geopolitical situation in Australia. Administrative notice was extended to the documents themselves, consistent with the provisions of Rule 201 of Fed. R. Evid. This notice did not foreclose Applicant from challenging the accuracy and reliability of the information contained in the reports addressing Australia's current status.

Summary of Pleadings

Under Guideline C, Applicant allegedly: (a) exercised dual citizenship with Australia and the United States by applying for citizenship with Australia, applying for and retaining an Australian passport in January 2006, even though he possessed a U.S. passport issued in June 2002 that will not expire until January 2016, and used his Australian passport instead of his U.S. passport for travel to Australia from about 1998 to at least 2009 and (b) obtained an Australian secret or top secret security clearance, which he has held from 1993 to at least February 2010, having secured its update in about 2008.

Under Guideline B, Applicant allegedly: (a) sought and held employment with an Australian defense organization from about 1993 to 1998 and (b) maintains substantial

financial and property interests in Australia, to include a bank account with a value of approximately $700,000.

In his answer to the SOR, Applicant admitted all of the allegations. He provided no explanations.

Department counsel amended the SOR in February 2011 to add Guideline L allegations. Under Guideline L, the allegations contained in subparagraphs 1.b and 2.a were incorporated by reference. In his answer, Applicant admitted the amended allegations without explanation.

Findings of Fact

Applicant is a 74-year-old engineering consultant for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Applicant married W1 in April 1958 and divorced her in October 1961. (GEs 1 and 4; Tr. 77) He has three adult children from this marriage. (GE 1) He married W2 in June 1982. She developed depression later in their marriage and turned to alcoholism. (Tr. 84-86) W2 abandoned him in the early 90s, claiming she could never cure herself while living with him. (Tr. 85-86). He divorced W2 in June 1992. (GE 1)

Applicant married W3, a U.S. citizen, in September 1992. (GE 1; Tr. 87-88) W3 passed away in July 2006 after a long battle with cancer. (GEs 1 and 4) Two years later, he married W4, a U.S. citizen and resident. (GE 4; Tr. 147) They continue to maintain their primary residence in the U.S. (GE 4)

Between 1955 and 1958, Applicant served in the U.S. military as a Army enlistee. (GE 1; Tr.76) He received an honorable discharge in May 1958. Following his Army discharge, he enrolled in college on a night basis and pursued an engineering curriculum. (Tr. 77-78)

Applicant earned a BS degree in electrical engineering from an accredited U.S. university in June 1965. (GEs 1 and 4) He earned an MSE in engineering from another institution in June 1967 and a PhD in electrical engineering from the same institution in September 1971, while working for a defense contractor. (GEs 1 and 4; Tr. 79-80)

Between 1973 and 1993, Applicant worked for a major defense contractor. Before his retirement in 1993, he served as his company's chief scientist and was responsible for research and development of weapons systems for DoD. (GE 4; Tr.82-83). He became a self-described authority on stealth air vehicle design and development, weapon systems analysis and design, radar and infrared surveillance, and all-spectrum signatures and images of air, land, and sea targets. (GE 4) He held a

security clearance for all of his employment years with this defense contractor. With his anticipated retirement from his defense employer, Applicant also resigned his membership on DoD's scientific advisory board. (AE K)

Following his retirement from his U.S. defense contractor employer in 1993, Applicant and W3 (who worked for the same defense contractor and held a security clearance at the time of their marriage) made a joint decision to relocate to Australia and start a new life. (GE 4 and AEs F and G; Tr. 87-90) Without an identified job in the country, Australia's immigration laws did not permit residence in the country beyond the three months available on a tourist visa. (GE 4; Tr. 89-90). And because of a cannot-compete clause in his employment contract with his U.S. employer, he could not employ with any private competitor of his U.S. employer. (Tr. 185-186).

With the help of W3, Applicant was able to locate a potential job with an Australian defense organization. (Tr. 93-94, 181-183) Before accepting the Australian defense offer, he obtained oral assurances from the U.S. State Department (DoS) that his U.S. citizenship would not be jeopardized by his taking permanent Australian citizenship should he ever return to the United States and reenter the U.S. defense industry (Tr. 95-97)

Applicant also elicited assurances from his U.S. defense employer and AF security officers that he should not encounter any problems reactivating his U.S. security clearance, absent any encountered problems in Australia. (Tr. 96-97; 188-192) However, his assurances were not reduced to writing.

In March 1993, Applicant accepted employment with an Australian defense organization under a temporary employment contract (guaranteed for one year and renewable for up to five years as a principal research scientist (GEs 2 and 4 and AEs F, G, and Q; Tr. 185) with this defense organization. He advised his prospective employer of his intent to relocate to Australia. (GE 1 and AE Q) At the time, he had no intention of relocating to Australia permanently. (Tr. 95-96) In exit letters to colleagues with his defense contractor, he disclosed his plans to take a temporary civilian position with the Australian Defense Department. He assured his colleagues of his intention to resume his career in the United States (conditions permitting)

Initially, Applicant and W3 acquired temporary Australian residency status. (Tr. 105) His Australian employer advised him that after May 1995 he could not reenter Australia without Australian citizenship and persuaded him to switch to permanent residency status. (Tr.106-108)

Applicant's employment conditions with his new Australian government employer required him to sign an agreement that he would seek citizenship when he became eligible. (GE 4) With help from his Australian employer, he was able to expedite his citizenship application and acquired his Australian citizenship in a little over two years (i.e, in 1996). (GE 2; Tr. 120) His employer also required him to obtain an Australian

security clearance as a condition of employment. (GEs 2 and 4 and AEs F and G; Tr. 109)

Upon applying for Australian citizenship in 1993, the Australian DoD granted him a security clearance the same year. (Tr. 109) Applicant held an Australian security clearance for the duration of his employment with his Australian defense organization. (GE2)

Applicant's civilian work for his Australian defense organization involved mostly classified projects (about 80%), but included some work on analysis of Australian cooperative ventures with the United Sytates on overhead surveillance. (Tr. 191-192) His work included scientific analysis of airborne radar systems. (AE O; Tr. 192) Applicant continued his direct employment with his Australian defense organization through August 1998, and held both Australian citizenship and an Australian security clearance for the duration of his employment. (Tr.120,151-152)

While still employed by his Australian defense organization, Applicant also undertook consulting assignments with both U.S. defense contractors and the U.S. DoJ with the acquiescence of the Australian government (GE 4 AE O; Tr.112-113-194-195) His consulting work for DoJ required a security clearance, and DoJ granted him a security clearance in 1996 without any documented ancillary DoD rights. (AE J Applicant made it clear to his Australian defense employer that "classified knowledge gained through his previous employment on Defense projects in the U.S. would not be divulged." (AE O) Applicant's Australian defense employer accepted Applicant's self-imposed information-sharing limitations with the understanding he would avoid any conflicts of interest, and approved his DoJ assignment. (AE O; Tr. 114-115)

For the ensuing six years (between 1995 and 2001), Applicant commuted to the United States to fulfill his witness and consulting commitments to the U.S. DoJ. (GEs 2 and 4) His U.S. DoJ employer at the time sponsored Applicant in his security clearance application. (GE 4) Applicant assures he was granted a security clearance for his DoJ consulting work in 1997 while he was still contemporaneously employed by the Australian defense organization, and with the acquiescence of his DoJ employers. (AEs B, H, M, and R; Tr. 116-118, 126-127)

Applicant assures he fully informed his DoJ employer of his Australian citizenship and security clearance and past employment with the Australian defense organization. (AE R; Tr. 116-118,126-127) However, the declaration furnished by the DoJ attorney responsible for hiring Applicant as a DoJ expert does not indicate any awareness of Applicant's holding an Australian security clearance. And the SF-86 Applicant completed for DoJ does not list any Australian security clearance. (AE I). So, it is still unclear from the proofs whether DoJ was officially informed of Applicant's Australian security clearance when it approved his security clearance for access to DoJ-related classified information.

Besides his DoJ consulting contract, Applicant was sponsored by a DoD contractor in1996 to obtain a security clearance that would permit him access to classified information. As a part of his application, Applicant was asked to provide a separate SF-86. He completed this SF-86 in November 1996 and was granted a DoD security clearance in 2000. (AEs J and M) In his clearance application, he listed his Australian citizenship and passport, but not his Australian security clearance. (AE J; Tr. 127-130) Whether DoD was aware of Applicant's Australian security clearance when it granted him a DoD clearance in 2000 is unclear.

Post-retirement activity

Upon his retirement from his direct employment position with the Australian defense organization in 1998, Applicant became eligible for an Australian pension. (GE 2) Since 1998, he has continued to receive an annual pension from the Australian government totaling around $10,000. (GE 2) Between 1998 and 2001, he continued to consult with the defense organization, as well as DoJ and U.S. defense contractors, on both classified and unclassified projects. During this time frame, he retained his security clearance with the Australian government while supporting the government's defense science board. (GEs 2 and 4 and AE B; Tr.132-134, 226) He and W3 also looked for new housing in a northeast section of Australia. (GE 4) They purchased a home in this region and established their permanent residence in this home. (GE 4)

By late 1998, W3 had contracted a rare cancer. (GE 4; Tr. 225) To ensure the best medical treatment for her, they returned to the U.S. in 2001. (GEs 2 and 4) By 2001, W3's health had deteriorated to the point where she required regular cancer treatments. (GEs 2 and 4; Tr. 137-138, 225) Between 2001 and 2005, Applicant and W3 purchased a home in their local U.S. community and remained in the United States for the most part. (GE 4; Tr. 138) During this inclusive period, Applicant suspended virtually all of his U.S. and Australian consulting assignments. (Tr. 139) For added convenience when he did return to Australia for business purposes, he obtained an Australian passport in 1998 and used it on his return trips. (GE 2) He updated his Australian passport in January 2006, even though he had previously updated his U.S. passport in June 2002. (GE 2)

W3 passed away in early 2006. (GEs 1 and 4; Tr. 140). In September 2006, Applicant applied for the updating of his DoD security clearance (GE 2; Tr. 143-144) The following month (in October 2006), he applied to the Australian government for the updating of his Australian security clearance; his clearance was updated. When asked by an investigator of the Office of Personnel Management (OPM) who interviewed him in January 2007 why he updated his Australian security clearance, Applicant responded that he "wanted to keep all his options open." (GE 2) To date, he has retained his Australian clearance.

Applicant last provided consulting services to the Australian government in 2007. (Tr. 209) He maintains contact with a number of friends and former colleagues in Australia, but has no family members living in the country. (Tr. 171-172) Currently, he

earns consulting fees in the United States that have varied from $40,000 a year to $100,000 a year. (Tr. 171)

Applicant's property interests

When Applicant relocated to Australia in 1993, he transferred all of his combined checking, savings and term deposits in U.S. banks (about $700,000) to an Australian savings account (AEs 2 and 4). He and W3 purchased a home in Australia following their relocation and held the home for approximately five years before they sold it in 1998. (GE 2; Tr. 105) Following Applicant's retirement from his Australian government employment the same year, he and W3 purchased another home in a northern Australian province, with the intention of using the home for their permanent Australian retirement. (AE 2). They paid over $600,000 in cash for their home and never placed a mortgage on the property. (GE 2; Tr. 161)

With funds withdrawn from his Australian bank account, Applicant and W3 purchased their U.S. home in the 1993 time frame. They financed the purchase of this home with a first mortgage (amount unknown). Following W3's death in 2006, Applicant continued to maintain this home with his own resources. After his marriage to W4 in May 2008, he and his spouse continued to maintain both of their homes in their U.S. community.

By 2007, Applicant was no longer reliant on income from Australia to cover his expenses (save for expenses incurred in the maintenance of his Australian home and visits to the country). He maintained U.S. assets of $363,000 (with $263,000 allocated to his home) at the time and a U.S. IRA account valued at about $700,000. (GE 2) W4 reported assets of about $125,000 and an IRA account worth about $250,000. Still, he maintained his Australian home, valued at $1.1 million, and retained deposits of around $620,000 in an Australian bank. (GE 3) He also receives a small pension from Australia as the result of his direct employment with a defense organization of the Australian government.

Committed in 2007 to relocating permanently to the United States transferring many of his Australian liquid assets to U.S. accounts, and updating his U.S. security clearance, Applicant placed his Australian home up for sale the same year. (GE 2; Tr. 145) He sold this house in March 2009. (Tr. 146) With urging from W4, he then made a cash purchase of a smaller vacation home in the same region of Australia for about $650,000 and made substantial improvements in the home (GE 4; Tr. 147-148, 159-160) Applicant and W4 took possession of the home in April 2009. (Tr. 148)

Having second thoughts on the wisdom of purchasing this second home, Applicant and W4 placed the property up for sale in May 2010 with a local real estate agent. (AE N; Tr. 150-154) When they did not receive any offers for the home at their $750,000 asking price, Applicant lowered the asking price to $700,000. (AE N; Tr. 160-162)

Applicant's listing agreement expired in March 2011. (AE N) His current progress in selling his Australian residence is unknown. (Tr. 162) He has no updated information on market conditions or his sale prospects in the foreseeable future, but knows he needs his Australian citizenship to retain and sell the property at fair market value. (AE C; Tr. 162-163) In the interim, he still maintains a large Australian bank account (around $800,000). He has net annual income from Australia of approximately $53,000, which consists of his lectureship, interest on his savings, his 401(k), and his Australian government pension, which nets him about $1,200 a month. (GE 4; Tr. 170-171; 214-215) He continues to pay Australian income and property taxes, and has voted in Australian elections. (Tr. 215-216) By comparison, Applicant has a home in the U.S. valued at about $200,000 and a U.S. bank account of $160,000. (Tr. 168)

Applicant's passport, citizenship, and security clearance status

Since updating his Australian passport in January 2006, Applicant used it on several occasions to enter and exit Australia. (Tr. 212) He never used his Australian passport after 2009 and documents surrendering it to the Australian government in April 2011. (AE L) Currently, Applicant retains his U.S. passport and uses it now exclusively when he travels anywhere in the world. It is his understanding that Australian citizens must use their Australian passports when entering and exiting the country; U.S. citizens must use their U.S. passports. (Tr. 219) Applicant is not sure how Australia administers its passport laws with dual citizens like himself.

When Applicant applied for Australian citizenship in 1993, he pledged his loyalty to Australia and its people, "whose democratic beliefs I share, whose rights and liberties I respect, and whose laws I will uphold and obey." (GE 4) This pledge has evolved since its introduction in January 1949. (GE 5) The original citizenship oath required the applicant to swear allegiance to be faithful and bear true allegiance to his Majesty King George the VI, his heirs, and successors, faithfully observe the laws of Australia, and fulfill his duties as an Australian citizen. (GE 5) This oath underwent a number of amendments between 1948 and 1993. The 1993 amendment introduced a pledge of commitment to replace the oath or affirmation of allegiance and remove the reference to the Crown. (GE 5) Still, the pledge of commitment imposes a pledge of loyalty on an applicant to Australia and its people. The pledge is written in the conjunctive and binds an applicant to the country and its government and may not be parsed to minimize its impact on an applicant for Australian citizenship.

Applicant's claim of a more limited reading of the commitment pledge he took in 1995 to extend loyalty to Australia and its people cannot be sustained as a fair and reasonable interpretation of the pledge. By pledging his loyalty to Australia and its people, Applicant declared his support to Australia's government and institutions as well as its people, and in doing so placed himself in a position of potential conflict with the governmental interests of the United States were the two countries ever to become at odds over protecting their vital security interests. (GE 5)

When Applicant surrendered his Australian passport in 2011, he did not renounce his Australian citizenship. (AE L; Tr. 222) He is reluctant to renounce his

Australian citizenship for so long as he owns real estate in Australia. (Tr. 162-163, 165-166, 222) He understands that ownership of real property in Australia requires the owner to be either a citizen or permanent resident of Australia. He cites advice he received from his Australian attorney in October 2010 that should he surrender his Australian citizenship and passport, the country's foreign investment and review board could require him to sell his home and suffer losses, given the current depressed nature of the real estate market in his region of Australia. (AE C; Tr. 163, 237-239) Applicant's understanding of Australia's limitations on home ownership in the country is not in dispute. His decision to retain his Australian citizenship until he is able to divest himself of his Australian home is not an unreasonable one from an economic point of view. But it does reflect an option exercise and illustrates a split preference for the government and institutions of Australia and those of the United States.

Besides his continued holding of dual citizenship with Australia and the United states, Applicant retains security clearances with both Australia and the United states, as well. While he has had no occasion to use his Australian clearance in recent years, he has not relinquished it. (Tr. 227) He assures that he has never encountered a situation where his project access to classified information in either country created a conflict of interest with his clearance access in the other.

Applicant, however, has never obtained any written approvals that he can document. Considering all of the surrounding historical circumstances of Applicant's work in the two countries to date, inferences warrant that his holding security clearances with Australia and the United States contemporaneously provides the potential for a conflict of interest should the security interests of Australia and the U.S. ever diverge.

Australia's country status

The Commonwealth of Australia (comprised of six colonies) is a constitutional monarchy with a constitution patterned partly on the model of the U.S. Constitution; although it does not include a bill of rights. (*see Background Note: Australia, supra)* Australia is an independent nation within the British Commonwealth. It has a bicameral federal parliament, whose chambers have equal power, except that revenue bills must originate in the House of Representatives. (*see id.*)

Australia's court system is headed by the High Court of Australia, which has general appellate jurisdiction over all other federal and state courts and possesses the power of constitutional review. (*see Background Note: Australia, supra)* Australia has a population of 22.3 million and a large diverse economy with a GDP of $1.2 trillion (estimated 2009-2010). (*id.*)

In foreign relations, Australia has historically been a strong and dependable ally of the United States and has fought beside the United States and other Allies in virtually every significant conflict since WW I. (*see Security Treaty between Australia, New Zealand, and the United States, supra; Background Note: Australia, supra*) Australian-U.S. defense relations are grounded in the Australia, New Zealand, U.S. (ANZUS)

security treaty of 1951. (*see id.*) The treaty binds the signatories to recognize that an armed attack in the Pacific area on any of them would endanger the peace and safety of the others. Since New Zealand was suspended from treaty coverage following a port dispute in 1984, the ANZUS treaty remains in force between Australia and the United States under the abbreviated heading of AUSMIN. The United States and Australia hold regular consultations and conduct a variety of joint activities (including military exercises). As a result of terrorist attacks on the United States in September 2001, then-Prime Minister Howard and U.S. President Bush jointly invoked the ANZUS treaty for the first time. (*id*) Australia was one of the earliest participants in Operation Enduring Freedom.

In May 2009, the Australian Government released its Defense white paper, outlining Australia's long term strategic outlook, which calls for enhancing its military defenses. (*see Background Note: Australia, supra*). In November 2010, high level U.S. officials attended a summit with their Australian hosts to explore and chart future progress for their longstanding alliance with a collective view of shaping a more stable, prosperous region in light of current and emerging threats and challenges. (*see U.S.-Australia Alliance never more Important, supra*.)

More recently, U.S. President Obama and Australian Prime Minister Gillard conducted bilateral meetings in Washington in which they, *inter alia*, celebrated the 60th anniversary of their alliance and stressed the strengths of their alliance: shared values based on the deep and longstanding relationship between the two countries and their enduring friendship. *(see Remarks by President Obama and Prime Minister Gillard, supra*.)

U.S.-Australian relations are grounded in the WW II experiences of both countries. Similarities in culture and historical background and shared democratic values have made U.S. relations with Australia exceptionally strong and close. (*see* GE 7*; Background Note: Australia, supra*) Both countries share extensive links in their international relations that range from commercial, cultural, and environmental contacts to political and defense cooperation.

Historically, Australia and the United States have worked together closely to promote global trade liberalism over the past 50 years. (GE 7) Australia has demonstrated vital interests in U.S. economic, trade, and investment policies and has worked closely with the United States in the World Trade Organization (WTO) and other pursuits in promoting their trade liberalization agendas. (GE 7)

Two-way trade exceeded $7.7 billion U.S. dollars in 2008-2009 and shows no signs of ebbing in 2010. (*see Background Note: Australia, supra*) Anchored by a bilateral Australia-U.S. Free Trade agreement completed in 2005, Australia and the United States have worked on a range of liberalizing trade reforms designed to streamline and promote their trade liberalization agendas. (GE 7; *Background Note: Australia, supra*)

Endorsements

Applicant has excellent character references to his credit. Former colleagues with his longstanding defense employer in the United States who have worked with Applicant in the past, credit him with unique scientific and research skills. They consistently characterize Applicant as conscientious, dedicated, reliable, and trustworthy (*see* exs. D through S) Consistently, they stress his conscientious work habits and recommend him for a position of trust.

Applicant earned numerous awards for his scientific contributions to the U.S. defense effort before his retirement in 1993. Credits include a distinguished public service award in 1983 from the U.S. DoD, aircraft design award in 1989, and a design and development award in 1992. (AEs A and P) Applicant has been a fellow of prestigious engineering and aeronautics societies, and has been honored for his engineering contributions by the Australian government. (AE P)

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in reaching at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the revised AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments about whether the applicant is an acceptable security risk. When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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 chances; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Foreign Preference

The Concern: When an individual acts in such a way as to indicate 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. *See* AG ¶ 9.

Foreign Influence

The Concern: 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 the this Guideline can and should considered 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. *See* AG ¶ 6.

Outside Activities

The Concern: Involvement in certain types of activities of outside employment or activities is of security concern if it imposes a conflict of interest with an individual's security responsibilities and could create an increased risk of unauthorized disclosure of classified information. AG ¶ 36.

Burden of Proof

Under the Directive, a decision to grant or continue an applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove by substantial evidence any controverted facts alleged in the SOR; and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not

require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or his security worthiness through evidence of refutation, extenuation or mitigation of the Government's case. Because Executive Order 10865 requires that all security clearances be clearly consistent with the national interest, "security-clearance determinations should err, if they must, on the side of denials." *See Department of the Navy v. Egan,* 484 U.S. 518, 531 (1988).

Analysis

Applicant is a highly regarded defense consultant who, after retiring from his senior position with a U.S. defense contractor in 1993, relocated to Australia to work for an Australian defense organization. Conditions of his employment included Australian citizenship and an Australian security clearance. Within a year his Australian employer issued him a security clearance, and within three years, he was granted citizenship by the Australian government. Besides acquiring Australian citizenship and a top secret Australian security clearance, he obtained an Australian passport in 1997, which he used when exiting and entering Australia on his trips to the United States. While he has since surrendered his Australian passport, he retains both his Australian citizenship and his Australian security clearance, and plans to retain both for the foreseeable future.

Trust concerns relate to foreign preference, conflicts of interest associated with his holding dual security clearances with the U.S. DoD, and the Australian Defense Department, and foreign influence relative to his holding employment with an Australian Defense organization and maintaining substantial property interests in Australia.

Foreign Preference

Dual citizenship concerns necessarily entail allegiance assessments and invite critical considerations of acts indicating a preference for the interests of the foreign country over the interests of the United States. The issues, as such, raise concerns over Applicant's preference for a foreign country over the United States. By accepting employment with an Australian defense organization, obtaining an Australian passport and security clearance, transferring his bank accounts and other liquid assets to Australia, and acquiring Australian real estate reserved for residents and citizens of the country, Applicant revealed a split preference for the U.S. and Australia. By accepting Australian citizenship, he satisfied a major legal requirement for acquiring real property in the country.

Taking advantage of one of Australia's ownership conditions, he and W3 were able to acquire and hold two pieces of property in Australia between 1993 and 1998.

And with his Australian passport and security clearance, he was able to freely exit and reenter the country with minimal disruption. Applicant continued his practice of using his Australian citizenship, passport, and clearance to vest and protect his consulting and real estate interests in the country.

Not until just before the hearing did he surrender his Australian passport to Australian government personnel. Pending the sale of his home, he remains unwilling to renounce his Australian citizenship. And he indicates uncertainty how to relinquish his Australian security clearance. So, as matters stand, Applicant will continue to maintain his dual citizenship with Australia and retain his Australian security clearance for the foreseeable future.

While Applicant's surrender of his Australian passport may be sufficient to satisfy the technical surrender requirements of MC ¶ 11(e) of the AGs for foreign preference (*see discussion infra*), it does not in of itself resolve the larger preference question raised in this case. Whether Applicant's possession and use of his Australian passport reflect an overall preference for his acquired country of Australia, or enjoyment of a privilege of foreign citizenship for convenience purposes only that is not incompatible with his imposed fiduciary duties to the United States, are issues that require reconciling with the security requirements demanded of those who are afforded access to U.S. classified information.

Since becoming a naturalized Australian citizen, Applicant has taken several actions and exercised Australian privileges that reflect active indicia of dual citizenship. Specifically, he accepted employment with the Australian government, acquired Australian citizenship and an Australian security clearance to satisfy the demands of his Australian employer, purchased real property and invested funds in Australian banks, obtained an Australian passport to meet country exit and entry requirements imposed by the Australian government, and retained his Australian citizenship and security clearance.

In assessing split-preference cases, the Appeal Board has looked to indicia of active exercise of dual citizenship. In cases where there is record evidence of a dual-citizen applicant having substantial real property interests in a country that are not available to non-residents or citizens on the same terms, the Appeal Board has considered such interests to represent special benefits or privileges that reveal a preference to that particular country. *See* ISCR Case No. 08-02864 at 4 (App. Bd. Dec. 29, 2009); *See* ISCR Case No. 16098 at 2 (App. Bd. May 29, 2003).

Department Counsel finds parallels in Applicant's situation in ISCR Case No. 08-05869, at 4-7 (App. Bd. July 24, 2009) and the facts in the present case. Like Applicant here, the applicant in ISCR Case No. 08-05869 relocated to Australia and became a naturalized Australian citizen with an Australian passport and security clearance who maintained dual citizenship with the U.S. However, his case differs from Applicant's in many key respects. Unlike Applicant, the applicant in ISCR Case No. 08-05869 was commissioned into the Australian Army, accepted graduate student benefits from the

Army, paid Australian taxes, voted in Australian elections, and contributed to an Australian retirement fund. By joining the Australian Army, that applicant demonstrated a willingness to risk life and limb for that country, which the Appeal Board found to reflect strong evidence of a "profound, deeply personal commitment to the interests and welfare of that country." (*id.*) Even after that applicant renounced his Australian citizenship and relinquished his Australian passport, the Appeal Board found these actions insufficient to mitigate Applicant's demonstrated preference for Australia (*id.* at 5) Considering the totality of the applicant's actions in ISCR Case No. 08-05869, the Appeal Board found a continuing preference for Australia despite his eventual return to the United States, relinquishment of his Australian citizenship, and surrender of his Australian passport. *See id*, at 5-6.

Applicant's situation differs appreciably from those linked to the dual Australian-U.S. citizen applicant in ISCR Case No. 08-05869, *supra*. Service in a foreign military requires much deeper and more exacting commitments to the country's defense efforts than does working for the same foreign government in a civilian capacity. Applicant's continued maintenance of his Australian dual citizenship and security clearance to protect his property interests and consulting prospects in the country is more comparable to the fact situation in ISCR Case No. 08-02864, *supra.* Applicant's retaining his Australian citizenship and security clearance enables him to preserve his Australian real estate holdings.

Without dual Australian citizenship retention, Applicant could be subjected by the Australian government to a forced sale of his property in a poor real estate market. And by holding on to his Australian security clearance, he is able to retain his employment and counseling options in Australia in case his U.S. consulting business does not prosper as he hopes. Applicant's retaining his Australian citizenship and security clearance in these circumstances represents material indicia of a preference for Australia that cannot be easily reconciled with the split preference he has shown for many years for his home country of the United States.

Preference questions require predictive judgments about how an applicant can be trusted in the future to honor his fiduciary responsibilities to the Government. Applicant worked in the defense industry as a respected scientist and advisor for over 25 years and held security clearances for most of his professional career. Although he checked with State and Defense Department officials about his prospects for regaining his security clearance should he choose to return to the United States, he surely was aware of the potential risks of working for the Australian government, acquiring dual citizenship with the country, accepting a security clearance from his Australian employer, and retaining his clearance while contemporaneously holding a U.S. security clearance. While his choices are understandable, considering his circumstances when he retired from U.S. defense contractor in 1993, they also reflect a current and ongoing split preference for the United States and Australia.

Because Applicant elected to retain his Australian citizenship, security clearance, passport, and other privileges of Australian citizenship (e.g., a pension and home

ownership entitlements) while he still held dual U.S. citizenship and a U.S. security clearance without seeking the written approval of authorized DoD officials, the Government may apply certain provisions of disqualifying condition (DC) ¶ 10(a) of AG ¶ 9, "exercise of any right, privilege or obligations of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This DC 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;
>
> (3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country;
>
> (4) residence in a foreign country to meet citizenship requirements;
>
> (5) using foreign citizenship to protect financial or business interests in another country;
>
> (6) seeking or holding political office in a foreign country; and
>
> (7) voting in a foreign election."

Specifically, DC ¶ 10(a)(1)(3)(5) and (7) apply to the established facts and circumstances herein. By acquiring and retaining his Australian citizenship and passport, Applicant was able to accept special real estate and mortgage borrowing benefits in the Commonwealth of Australia that are not currently available to non-Australian residents and citizens. As a dual citizen and resident of Australia, he has paid income and property taxes to the Australian government and receives Australian pension benefits. And he has voted in Australian elections.

Were Applicant to renounce his Australian citizenship and relinquish his Australian security clearance, he risks a potential forfeiture of his property and his ability to acquire Australian consulting assignments. This creates a dilemma for Applicant who has historically expressed his desire to keep his options open. His election to retain the Australian citizenship he acquired in 1995 and preserve his consulting options in Australia with his retention of his Australian citizenship makes good practical sense and reflects entirely rational and understandable choices on his part. They also reflect split preferences for his newly adopted country of Australia, where he would like to retain a presence if possible.

Applicant surrendered his Australian passport in April 2011, in accordance with established procedures for surrendering a foreign passport to a cognizant security authority of the Australian government. In doing so, he does forfeit the short-term flexibility of unfettered and undocumented travel. Applicant is quite right on this point. And, he may, accordingly, claim the benefits of another mitigating condition under

Guideline C. MC ¶ 11(e), "the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated," is fully applicable as well to Applicant's situation. Because his dual citizenship status is not based on his parent's citizenship, he may not claim the benefits of MC ¶ 11(a), "dual citizenship is based solely on parent's citizenship or birth in a foreign country." Nor are any of the other potential mitigating conditions available to Applicant based on the developed record.

Whole person precepts are certainly helpful to Applicant in surmounting the Government's preference concerns herein. The strong trust impressions he has forged with his supervisors, coworkers, and friends who have worked with him add support to his claims that during his more than 25 years of faithful service to the defense industry he has demonstrated loyalty and preference for the United States.

Overall, though, Applicant is not able to persuade that his current preference is with the United States. Because he made considerable use of Australian privileges associated with his obtaining his Australian citizenship and passport in 1995, he manifested a preference for Australia under the criteria as established by the Appeal Board. Applicant fails to absolve himself of foreign preference concerns associated with the presented issue of whether he retains a preference or split preference for his adopted country (Australia), or his country of birth (the United States). Unfavorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a and 1.b of Guideline C.

Outside Activities that produce conflicts or potential conflicts of interest

Applicant's contemporaneous, and potentially simultaneous possession of security clearances with the US. DoD and Australia's defense department poses a conflict of interest with his U.S. DoD issuer on one side and a potentially similar conflict risk with his Australian DoD employer. The Appeal Board addressed conflicts of interest generally in ISCR Case No. 00-0244 at 3-5 (Appeal Board January 29, 2001). While noting the special relationship the host country employing the applicant had with the United States and the applicant's discounting of any potential conflict of interest, the Board found applicant's conflict was not mitigated by the special allied relationship of the two countries or by the absence of any realistic potential of the applicant's being subjected to undue influence by the host government he worked for.

In ISCR Case No. 00-0244, *supra*, the Board noted applicant's lack of a proposal to terminate his conflict of interest, and found the applicant's duties with his first company to be incompatible with any security responsibilities he would have while employed with his second company. Considering all of the evidence of record, the Board concluded that even if the likelihood of "undue influence, coercion or pressure to disclose classified information could be discounted, the possibility of inadvertent disclosure cannot." *See id*, at 6. The Board found the applicant failed to meet his burden of proof and sustained the hearing decision.

While the underlying facts differ in ISCR Case No. 00-0244 from Applicant's situation, the core principles that undergird conflict of interest concerns do not. Where conflicts of interest exist, the potential for inadvertent disclosures, even if not intentioned, cannot be easily reconciled. Where actual or potential conflicts of interest are found, they must necessarily be carefully scrutinized.

Absent written approval by the authorized DoD approving authority, his holding of security clearances with both countries simultaneously (as he seeks to achieve) would violate U.S. security guidelines, as they are currently written, and leave U.S. clearance reviewers without any cognizable way of knowing and assessing what U.S. classified information is shared with its U.S. counterpart, Australia.

Based on the assembled facts, the Government may rely on two of the disqualifying conditions covering outside activities: DC ¶37(a)(1), "any employment or service, whether compensated or volunteer, with (1) "the government of a foreign country" and (4), "any foreign, domestic, or international organization or person engaged in analysis, discussion, or publication of material on intelligence, defense, foreign affairs, or protected technology."

To his credit, Applicant owns a proven track record for reliable and trustworthy service in the U.S. defense industry before his retirement in 1993 and relocation to Australia. He has been honored with numerous awards and citations recognizing his considerable contributions to the U.S. defense effort and his dedication to protecting vital defense secrets.

Holding of a U.S. security clearance permits little deviation in the holder's fiducial responsibilities and duties. Presumably, other governments like Australia impose similar burdens on their holders of security clearances. For so long as the clearance holder is burdened with reciprocal fiducial obligations to each country he has clearances with, he places himself at risk to even inadvertent compromises of classified information in his possession and control.

Before or after he applied for his U.S. security clearance, Applicant had options at his disposal. As a first option, he could have sought written approval from the appropriate DoD authorizing official to maintain simultaneous security clearances with the U.S. and Australia. Alternatively, he could have formally relinquished his Australian security clearance by posting a written request to relinquish his clearance to the appropriate Australian government official responsible for administering clearances. Applicant chose neither option and seeks a U.S. security clearance based on his longstanding loyalty to the United States and his historically special contributions to U.S. security interests.

Applicant's maintenance of simultaneous security clearances presents conflicts that cannot be safely discounted. While the risks of his holding dual clearances pertain principally to risks of inadvertent disclosures while working on individual or joint projects, they invite key concerns that cannot be reconciled without DoD written approvals.

Available mitigating conditions within DOHA's jurisdiction require either an *a priori* approval of Applicant's holding simultaneous security clearances with the United States and Australia, or that failing, relinquishment of his Australian security clearance. To date, Applicant has pursued neither option, and as matters stand, he cannot avail himself of any of the mitigating conditions covered by Guideline L. Unfavorable conclusions warrant with respect to the allegations covered by Guideline L.

Foreign influence

Applicant and his family have deep roots in the United States. Determined to make a new life for himself and W3, he acquired dual citizenship with Australia, gained employment with an Australian defense organization, and took advantage of the country's privileges reserved for Australian citizens and residents: ownership of local real estate, receipt of earned health and pension benefits, and a security clearance sponsored by the Australian defense organization who employed him.

Australia is a longstanding friend and ally of the United States with core values of democracy, free markets, and adherence to the rule of law that compares favorably to our own. Australia has a security treaty with the Unites States by which each member is committed to the mutual protection of the other against outside aggressors. Since WW I, Australia has participated in every conflict as a U.S. ally. Since gaining its independence from the British Crown, Australia has flourished under well-established constitutional government and institutional respect for human rights, and has benefitted from its strong bilateral security and trade relations with the United States. Foreign ownership of real estate within its homeland remains one of the few areas of disagreement between Australia and this country.

Still, the Government urges trust concerns over risks that Applicant might use his U.S. and Australian contacts and security clearances with both countries to exploit his real estate and other interests he retains in Australia. Because he has a security clearance and potential Australian clients with needs for his special skills and experience, conceivably, he might be subject to undue foreign influence by Australian government authorities to access sensitive proprietary information in Applicant's possession or control. As such, he presents a potential heightened security risk covered by disqualifying condition (DC) ¶ 7(a), "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," of the AGs for foreign influence.

Applicant's special access through his holding of Australian citizenship and a security clearance, combined with his own demonstrated split-preference for the country, does pose some potential concerns for him because of the risks of undue foreign influence that could potentially affect his use of his acquired real estate and other gained financial benefits (e.g., his banking protections and his pension benefits) in Australia. But they do not appear to pose any heightened risks.

Applicant has no immediate family members resident in Australia. However, he retains large Australian interests in real estate, bank accounts, and pension interests. He also retains the potential for contacts with Australian government and military officials by virtue of the Australia citizenship and clearance he retains. As a result, consideration of DC ¶ 7(b), "connection 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*,"* is warranted herein.

The AGs governing collateral clearances do not dictate *per se* results or mandate particular outcomes for applicants with relatives who are citizens/residents of foreign countries in general. What is considered to be an acceptable risk in one foreign country may not be in another. While foreign influence cases must by practical necessity be weighed on a case-by-case basis, guidelines are available for referencing in the supplied materials and country information about Australia. The AGs do take into account the country's demonstrated relations with the United States as an important consideration in gauging whether the particular relatives with citizenship and residency elsewhere create a heightened security risk. The geopolitical aims and policies of the particular foreign regime involved do matter.

Based on his case-specific circumstances, MC ¶ 8(a), "the nature of the relationships with foreign persons, the country in which these persons are located, or the persons or activities of these 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." is not fully available to Applicant. For so long as he retains his Australian citizenship and security clearance, Applicant poses some risk that could subject him to potential pressures and influence from Australian government and military officials.

Of some benefit to Applicant is MC ¶ 8(b), "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 United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest." Applicant's demonstrated loyalty, patriotism, and professional commitments to the United States, are well demonstrated and sufficient under these circumstances to neutralize all potential conflicts that are implicit in his professional relationships with Australian government and military officials.

Neither MC ¶ 8(c), "contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create risk for foreign influence or exploitation," nor MC ¶ 8(f), "the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual," are available to Applicant. His Australian contacts and financial interests are considerable

and account for major reasons why he has been unwilling to renounce his Australian citizenship and relinquish his Australian security clearance.

Available to Applicant is MC ¶ 8(e), "the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country." Applicant has been fully forthcoming to date in keeping his U.S. DoD and DoJ official contacts apprised of his work for the Australian government.

All told, Applicant's interests and contacts in Australia, while considerable and manifestly conflicting and potentially conflicting, do not appear to pose heightened risks of pressure, coercion, and influence that could be brought to bear on Applicant, his former colleagues and friends, and family members. Both Australia's strong ties to the United States and Applicant's longtime support of U.S. defense and security efforts minimizes any risk of pressure, coercion, or compromise in the near and foreseeable future.

Whole-person assessment is available to minimize Applicant's exposure to any potential conflicts of interests with Australian government and military officials. His former supervisors and colleagues with his previous U.S. employer and DOJ colleague who worked closely with Applicant on a highly classified U.S. defense project consider him very reliable and trustworthy. And Applicant is not aware of any risks of coercion, pressure, or influence that he or any of his former colleagues, friends, or family members might be exposed to.

Overall, any potential security concerns attributable to Applicant's having pension rights and property interests in Australia, as well as Australian security clearance, are sufficiently mitigated to permit safe predictive judgments about Applicant's ability to withstand any Australian risks of undue influence. Favorable conclusions warrant with respect to the allegations covered by Guideline B.

In reaching my decision, I have considered the evidence as a whole, including each of the factors and conditions enumerated in AG ¶ 2(a).

Formal Findings

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

GUIDELINE C (FOREIGN PREFERENCE):	AGAINST APPLICANT
Subparas. 1.a and 1.b:	Against Applicant
GUIDELINE B (FOREIGN INFLUENCE):	FOR APPLICANT

Subparas. 2.a and 2.b:	For Applicant
GUIDELINE L (OUTSIDE ACTIVITIES):	AGAINST APPLICANT
Subpara. 3.a:	Against Applicant

Conclusions

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 Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge