DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 08-05263
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro Se*

January 14, 2009

Decision

WESLEY, Roger C., Administrative Judge:

History of Case

On August 20, 2008, 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 finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on September 3, 2008, and requested a hearing. The case was assigned to me on October 30, 2008, and was scheduled for hearing on December 3, 2008. A hearing was held as scheduled, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At hearing, the Government's case consisted of three exhibits; Applicant relied on one witness (himself) and 10 exhibits. The transcript (R.T.) was received on December 12, 2008. Based upon a review of the case

file, pleadings, exhibits, and testimony, eligibility to access classified information is granted.

Procedural Rulings and Evidentiary Issues

Before the close of the hearing, Applicant requested leave to consider retention of his British passport and document its surrender should he make the decision to do so. For good cause shown, Applicant was granted seven days, to December 12, 2008 to supplement the record. The Government was afforded two days to respond. Within the time permitted, Applicant supplemented the record with e-mailed letters confirming his decision to surrender his British passport and documented surrender of his passport to his employer's facility security officer (FSO). Department counsel did not object to these post-hearing submissions. Applicant's two post-hearing exhibits were admitted and considered as exhibits A and B.

Summary of Pleadings

Under Guideline C, Applicant is alleged to have (a) exercised dual citizenship with Great Britain, (b) possessed a British passport, and (c) used his British passport to enter and exit Great Britain in May 2006 and June 2007.

For his answer, Applicant admitted all of the allegations in the SOR with explanations. He claimed he travels extensively for business and used his British passport to enter and European countries for convenience purposes. He claimed he has he lived in the U.S. for over 30 years and bears allegiance to the U.S. since he became a naturalized U.S. citizen in March 2006. He claimed to have designed and patented a new permanent resident card (introduced in 1998) that has proved extremely resistant to fraudulent duplication or alteration and has become the standard for ID cards world-wide and a permanent resident card (PRC) that is recognized by U.S. Government agencies. He claimed to be working on the design of the next generation secure PRC and claimed his use of his British passport when traveling to Europe is in the best national interests of the U.S.

Findings of Fact

Applicant is a 57-year-old chief operating officer (COO) of 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.

Applicant's background

Applicant was born and raised in Great Britain to parents of British citizenship. He earned a PhD in Chemistry in Great Britain in 1975 and completed post-graduate work in Canada in 1976 (R.T., at 52).

Applicant immigrated to the U.S. in 1976 to work for a manufacturing company. He worked for this company for several years before moving to another region of the U.S. to pursue different scientific interests (R.T., at 52-53).

Applicant became a naturalized U.S. citizen in March 2006 and obtained his U.S. passport the same month and year (*see* ex. 2; R.T., at 72)). Applicant delayed applying for U.S. citizenship, because at the time, he did not think he would be staying in the U.S. (R.T., at 54). Since becoming a U.S. citizen in 2006, though, he has voted in every U.S. election for the past two years and has been called for jury service (R.T., at 60).

Applicant is married and has two children (19 and 21 years of age, respectively). His wife (W) became a naturalized U.S. citizen in February 2006 and is a dual citizen with Great Britain. Applicant's children are completely Americanized and have no intentions of returning to Great Britain (R.T., at 58). They, too, hold dual citizenship status with the U.S. and Great Britain (R.T., at 56-57). They were able to obtain dual citizenship through Applicant and W (ex. 2). Neither Applicant nor W have exercised any rights of British citizenship, except for Applicant's possession and use of his British passport between May 2006 and June 2007 when he travels to Japan, Great Britain and other European countries (*see* ex. 2; R.T., at 72-73).

Applicant designed and patented a unique PRC in 1995 and 1999 (*see* exs. A and B; R.T., at 41). He assigned the patents to the corporation he co-founded in 1982 (R.T., at 63). He developed this card initially for use in Canada as a secure tamper-proof ID card. Applicant considers this card to be totally immune to compromise and the most secure publicly issued ID card in the world. Newspaper accounts covering his PRC and competitive ID cards developed abroad corroborate his claims (*see* ex. C). For comparative purposes, a recent newspaper article covering competitive secure ID cards in Thailand reports technology theft and risks of future compromise (*see* ex. G; R.T., at 47-48).

Applicant's PRC, by contrast, is tamper proof and is used by a number of U.S. Government agencies (*see* exs. C through F; R.T., at 42-49). Published Department of Justice (DoJ) accounts of this laser-etched ID card credit its use with the seizure of more than 2,000 counterfeit cards in 1998 alone (*see* ex. C). Immigration officials with DoJ stress the unique engraving features of Applicant's PRC and predict that its use will virtually eliminate mass production of counterfeit ID cards (ex. C). Applicant is currently working on the next generation U.S. Green Card, which he expects to introduce in March 2009 (R.T., at 48-49).

Applicant travels extensively throughout Europe to market his PRC and (since becoming a naturalized U.S. citizen) uses his British passport to facilitate his trips to Japan, Great Britain and other European countries (*see* ex. 2; R.T., at 46-47, 72-73). Heretofore, he has expressed his intention to retain his British passport and citizenship. He cites his ease of access to European countries with European membership as an important travel benefit when he uses his British passport for entry purposes, and for this

reason, he has worked hard to retain his British citizenship and passport (R.T., at 63-66, 73-74).

Were Applicant to use his U.S. passport on his trips to Europe and Japan, he assures that he would need a visa to return to the U.S. (R.T., at 65). This, in turn, would require a visa application, and an estimated week's travel delay (R.T., at 65-66). By contrast, when he travels to Japan and other European countries on his British passport, he does not need a visa to enter these countries (R.T., at 65-66, 73). Accordingly, he uses his British passport to enter Japan, Great Britain and other European countries, and his U.S. passport to exit these countries for the U.S. (R.T., at 67, 69, 73). Applicant does not validate his visa claims, though, and it is not fully clear in this record whether this is or always has been official U.S. visa policy for returning dual nationals.

Before obtaining his U.S. passport (in 2006), Applicant used his British passport exclusively to travel to and from Great Britain and other countries (R.T., at 70, 73-74). After he became a naturalized U.S. citizen, he tended more to blending his use of his British passport with his U.S. passport.

Should surrender of his British passport become necessary to ensure his obtaining his security clearance necessary, Applicant indicated he would be willing to surrender the passport to his FSO (R.T., at 50). Expressly afforded an opportunity after the hearing to relinquish his British passport (R.T., at 86-92), Applicant documents his surrender of the passport to his FSO (*see* ex. K and L). Under the terms of his passport surrender, his FSO agrees to notify DoD of any return of Applicant's passport in the future (*see* exs. K and L).

Applicant maintains weekly contact with his parents who are citizens and residents of Great Britain (*see* ex. 2). He sees his parents yearly on average when he either visits them in Great Britain or they visit him in the U.S.

Applicant owns a home in the U.S. valued at around $1.3 million and has an overall net worth of around $1.5 million (R.T., at 58-59). Neither he nor W have any assets or financial interests in Great Britain (*see* ex. 2; R.T., at 59, 61-62). He has a base salary of $300,000.00 a year with the company he owns and operates as a defense contractor (R.T., at 62). His company who own the patents on his PRC does not license the patents, and so, it does not collect any royalties on them (R.T.,a t 63). As an employee (COO) of his company, he received $1 per patent as consideration for his transfer of ownership of the patents to his company (R.T., at 63). The patents remain the property of his company and would stay with the company in the event he were to sever his ties with it.

Applicant documents his grants of a security clearance with another U.S. agency (DoJ), and urges DoD to follow the same guidelines used by the DoJ (*see* ex. J*;* R.T., at 49-50). He is highly regarded by the DoJ who commissioned him to develop a PRC for their use in 1995. The DoJ made a leadership award to Applicant in December 1999 in recognition of the PRC he developed for them in the same year (*see* ex. D). Applicant

received praise and acknowledgments from other public agencies for his PRC designs as well (*see* exs. C through F; R.T., at 42-45). Applicant is roundly credited with raising security standards for identification cards.

Policies

The revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (effective September 2006) list Guidelines to be considered by administrative judges in the decision making process covering DOHA cases. These Guidelines require the administrative judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the administrative judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the administrative judges in reaching a fair and impartial common sense decision.

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 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. *See* Adjudicative Guidelines (AG), ¶ 9.

Burden of Proof

By virtue of the precepts framed by 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 common sense 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 adversary 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 any controverted facts alleged in the Statement of Reasons, 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 her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

Analysis

Applicant presents as a naturalized U.S. citizen who was born to British parents, immigrated to the U.S. in 1976, and later married W, who like Applicant is a naturalized U.S. citizen with dual citizenship with Great Britain. Both W and Applicant's children have dual citizenship with Great Britain as well.

Aside from possessing a British passport and using it on a number of occasions to enter Japan, Great Britain, and other European countries for convenience reasons, Applicant has never exercised any active indicia of dual citizenship with Great Britain. Claiming his principal affections lie with the U.S., he, nonetheless, retained his British passport and citizenship.

Dual citizenship concerns necessarily entail allegiance assessments and invite critical considerations over acts indicating a preference or not for the interests of the foreign country over the interests of the U.S. The issues, as such, raise concerns over Applicant's preference for a foreign country over the U.S.

By virtue of his birth in his native Great Britain to his parents of British birth and citizenship, Applicant was endowed with dual British citizenship, which could be renounced by his expressed intention or actions. This, Applicant has never done, out of respect for his British roots and heritage. For the first 30 years of his residency in the U.S., he used his British passport exclusively on his personal and business trips to Japan, Great Britain and other European countries

Since becoming a naturalized U.S. citizen, Applicant has taken no actions and exercised no British privileges that can be fairly characterized as active indicia of dual citizenship, save for his limited use of his British passport when traveling to European countries. He has not voted in any British elections or served in the British military. Neither he nor W own or hold any assets or financial interest in Great Britain. By contrast, he and W have a sizable asset portfolio in the U.S.

Applicant has accepted no preferential educational, medical or other benefits from Great Britain since becoming a naturalized U.S. citizen. Nor has he ever performed or attempted to perform duties, or otherwise acted so as to serve the interests of Great Britain in preference to the interests of the U.S.

Because Applicant possessed and used his British passport, the Government may apply disqualifying condition (DC) ¶ 10(a) of AG ¶ 9, which provides:

> 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 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.

Applicant continued to use his British passport to facilitate his entry into Japan, Great Britain and other European countries between May 2006 and June 2007. He never voted in a British election and never served in the British military. He has never sought to hold political office in Great Britain since immigrating to the U.S. or used his British citizenship to protect his financial or business interests. Although his delays in applying for U.S. citizenship are a little troubling, his demonstrated loyalties and commitments have consistently been directed to the U.S. and its core values. His property and financial interests are located exclusively in the U.S., and he has voted consistently in U.S. elections since becoming a U.S. citizen in 2006. There is no probative evidence of his ever receiving any educational. Medical or retirement benefits from Great Britain.

By relinquishing his British passport, Applicant has complied with the mitigation requirements of MC ¶ 11 (e), "the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated," of AG ¶ 9. And, while his surrendering his British passport to his FSO does not automatically mitigate any past use of the passport to enter and exit European countries, his recited limited use of the passport is insufficient by itself to demonstrate Applicant's preference for Great Britain over the U.S.

Failure to satisfy a mitigating condition may be taken into account when assessing an applicant's overall claim of extenuation, mitigation, or changed circumstances, but may not be turned into a disqualifying condition. *See* ISCR Case No. 01-02270 (Appeal Bd. Aug. 29, 2003). That Applicant may wish to keep his British citizenship out of respect for

his family roots and heritage is not sufficient reason either to preclude him from mitigating security concerns over his holding dual British citizenship.

Whole person precepts favor Applicant's preference for the U.S. over Great Britain. He is a longtime resident of the U.S. (since 1976) and a naturalized U.S. citizen who has always demonstrated his loyalty for the U.S. His principal financial interests are situated in the U.S. And, his wife and two children are all U.S. citizens: his children by birth and W by naturalization.

Overall, Applicant persuades that his preference is with the U.S. He satisfies his proof burden in several ways: demonstrated lack of any prior exercise of any privileges associated with his British citizenship, save for his limited use of his British passport. Applicant absolves himself of foreign preference concerns and carries his evidentiary burden on the presented issue of whether his preference lies with his native country (Great Britain) or the country (U.S.) where he was naturalized. Favorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a through 1.c of Guideline C.

In reaching my decision, I have considered the evidence as a whole, including each of the factors and conditions enumerated in E 2(a) of the Adjudicative Process of Enclosure 2 of the Directive.

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):	FOR APPLICANT
Sub-paras. 1.a through 1.c:	FOR APPLICANT

Conclusions

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is granted.

Roger C. Wesley
Administrative Judge