DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 08-05869
SSN:	)	
	)	
Applicant for Security Clearance	)	

Appearances

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

April 24, 2009

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant's eligibility for access to classified information is granted.

Applicant submitted his Electronic Questionnaires fo Investigation Processing (E-QIP) Security Clearance Application (SF 86), on January 22, 2008. On December 10, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing 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 acknowledged receipt of the SOR on December 30, 2008. He answered the SOR in writing on January 22, 2009, and requested a hearing before an administrative judge. DOHA received the request on January 26, 2009. Department Counsel was prepared to proceed on February 27, 2009, and I received the case assignment on March 3, 2009. DOHA issued a notice of hearing on March 9, 2009, and I convened the hearing as scheduled on March 30, 2009. The government offered two exhibits (GE) 1 and 2, which were received and admitted into evidence without objection. Applicant testified on his own behalf. He submitted three exhibits (AE) A through C, which were received and admitted into evidence without objection. DOHA received the transcript of the hearing (Tr.) on April 3, 2009. I held the record open until April 14, 2009, for the submission of additional matters. Applicant timely submitted the additional evidence, which is marked as AE D and admitted into the record without objection. The record closed on April 14, 2009.

Procedural and Evidentiary Rulings

Motion to Amend SOR

At the end of testimony, Department Counsel moved to amend the SOR to add a new Guideline E allegation. (Tr. 84-93.) Applicant objected to the motion, arguing that he had not received prior notice and had not prepared to defend the new allegation. I denied the motion under due process considerations because Applicant had no prior notice of this new allegation. I also concluded that since the government had notice of this potential issue as of January 21, 2009, it had sufficient time to prepare an amended SOR, which would have given Applicant an opportunity to prepare a response to the allegation at the hearing. (Tr. 94.)

Findings of Fact

In his Answer to the SOR, dated January 21, 2009, Applicant admitted the factual allegations in ¶¶ 1.a, 1.b, 1.d, and 1.e of the SOR, with explanations. He denied the factual allegations in ¶ 1.c of the SOR.[1] He also provided additional information to support his request for eligibility for a security clearance.

Applicant, who is 49 years old, was born and raised in the United States (U.S.) He currently works for a Department of Defense contractor as a managing consultant in security. He began working as a federal contractor in 2003 for another company. His current employer requested that he apply for a security clearance.[2]

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[1]When SOR allegations are controverted, the government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. That burden has two components. First, the government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the government must establish a nexus between the existence of the established facts and events and a legitimate security concern. *See* ISCR Case No. 07-18525 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part).

[2]GE 1 (e-QIP) at 6, 11-14; Tr. 20-21.

Applicant graduated from high school. In July 1978 at age 18, he enlisted in the U.S. Army. He served on active duty from 1978 until 1981. During this time, the Army assigned Applicant to a tour of duty in Turkey. Although he was a military policeman in Turkey, he held a sensitive compartmented information (SCI) clearance. In 1981, he joined the Army reserves and began attending a two-year military college as a cadet. Although the Army reserves paid him as an E-5, the Army did not pay for this education. He paid for his college through the GI bill and with his money. Applicant received an Associate of Arts degree in statistics in May 1983.[3]

Applicant married his first wife, who was an Australian citizen, in December 1983, while a junior in college. He received his bachelors degree in May 1985. Shortly after his college graduation, he returned to active duty in the Army as a Second Lieutenant. He served on active duty from August 1985 until November 1988. During this time, he served an unaccompanied year in Korea and was promoted to First Lieutenant. He also held a secret clearance as an officer.[4]

Applicant's first wife gave birth to a daughter in October 1985. His first wife became very homesick. She told him she intended to return to Australia with their daughter. To preserve his family, Applicant agreed to move to Australia. The Army honorably discharged him in November 1988, and two weeks later he moved to Australia with his family.[5]

When he arrived in Australia, Applicant and his family lived with his in-laws, while he sought employment. He could not find permanent employment quickly. In late December 1988, Applicant contacted the Australian Army recruiting office and asked about joining the military. As a condition for his commission, the Australian Army required him to apply for Australian citizenship, which he did.[6] Upon proof of his application, the Australian Army commissioned him in February 1989. His son was born in 1989 in Australia. Australia granted him citizenship in November 1990. He never renounced his U.S. citizenship; rather he maintained dual citizenship with the U.S. and Australia. He also maintained both a U.S. and Australian passport.[7]

While in the Australian Army, Applicant attended graduate school, earning a masters degree in business computing. The Australian Army paid for this education and required him to serve an additional 18 months of military service. During his years in the Australian Army, Applicant served as a section commander in artillery guns, a unit

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[3]GE 1, *supra* note 2, at 27-30; Tr. 20, 50-54.

[4]GE 1, *supra* note 2, at 19-20; Tr. 55-57; 66-67.

[5]GE 1, *supra* note 2, at 22; Tr. 59-61.

[6]8 USCS § 1481 *et seq* addresses when a U.S. citizen may loss citizenship status and the government's burden of proof in such cases.

[7]GE 2; Tr. 22-32.

which used American made guns; a parachute jumper as he did in the American Army, and as the assistance administrator for the Australian Joint Intelligence Center. He held a top secret clearance while in the Australian Army. He described the Australian Army in which he served as not a nuclear capable military.[8]

As a citizen of Australia, Applicant paid taxes. He also voted in Australian elections, because voting is compulsory for Australian citizens. Applicant never owned property in Australia. He and his family lived in Army housing. While in the Australian Army, Applicant contributed money to a superannuation program, a program similar to a 401k. The Australian Army also contributed to this program. At age 55, Applicant is entitled to take a lump sum payment from the program, which he plans to do. As of January 11, 2009, this retirement fund was valued at $87,255. He will not receive a monthly retirement benefit from the Australian government or military.[9]

In 1996, his third child, a daughter was born. Less than six months after her birth, he and his first wife separated. He remained in Australian and in the Australian Army for two more years. In the summer of 1998, he resigned from the Australian Army at the rank of Major and returned to the United States. He and his first wife divorced in 2001. Applicant married his second wife, who was born and raised in the U.S., six weeks after his divorce. They have two sons, ages 7 and 4, who were born in the U.S. He lives in the U.S. with his second family. His three children from his first marriage live in Australia. His two daughters are dual citizens of the U.S. and Australia. His son is an Australian citizen. He is working towards obtaining U.S. citizenship for his son. He wants his three older children to have U.S. citizenship in addition to their Australian citizenship.[10]

As an Australian citizen, Applicant held an Australian passport along with his U.S. passport. For many years and because of the ease afforded to him, he used his Australian passport to enter and exit Australia and his U.S. passport to enter and exit the U.S. Since leaving Australia, he returned several times to visit his children. His last visit occurred in March 2007, when he returned to Australia for the funeral of a friend. His daughters have U.S. and Australian passports.[11]

Since returning to the U.S., Applicant worked as a consultant and as a federal government contractor. He also voted in U.S. elections. In 2003, he held a contractor position with a federal agency. When the agency learned that he claimed dual citizenship, it advised him that he could not work for them unless he renounced his Australian citizen. Within a week, Applicant notified the Australian embassy that he wanted to renounce his Australian citizen and turned in his passport. Australia formally

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[8]GE 2, *supra* note 7; Tr. 67-69.

[9]Tr. -38-39, 46-49, 77-80.

[10]Tr. 19-20, 41-43, 69-70,

[11]*Id*. at 41-44.

accepted his renunciation and declared him not a citizen of Australia on June 20, 2003. His Australian passport immediately became invalid. Once he renounced his Australian citizenship, he returned to his federal contractor job.[12]

Applicant credibly testified that he believed he was not going against the U.S. by joining the Australian Army. He always considered himself a U.S. citizen and the U.S. his homeland. He wants his three older children to have dual citizenship with Australia and the U.S. His former military commander and a former military co-worker wrote a strong letters of recommendation on his behalf, indicating that the only reason Applicant joined the Australian Army was to keep his family together. A more recent co-worker also wrote a strong letter of recommendation on his behalf. All believe that he would never betray classified information and do not doubt his allegiance to the U.S.[13]

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 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

[12]AE D; Tr. 40-46 72-74.

[13]AE A; AE B; AE C: Tr. 27, 92-93.

Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.[14]

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

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[14]After any decision, the losing party has a right to appeal the case to the Defense Office of Hearings and Appeals Appeal Board. The Appeal Board's review authority is limited to determining whether three tests are met:

> E3.1.32.1. The Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge:
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> E#.a.32.2. The Administrative Judge adhered to the procedures required by E.O. 10865 (enclosure 1) and this Directive: or
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> E3.1.32.3. The Administrative Judge's rulings or conclusions are arbitrary, capricious, or contrary to law.

The Appeal Board does not conduct a "*de novo* determination", recognizing that its members have no opportunity to observe witnesses and make credibility determinations. The Supreme Court in *United States v. Raddatz*, 447 U.S. 667, 690 (1980) succinctly defined the phrase "*de novo* determination":

> [This legal term] has an accepted meaning in the law. It means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy. Thus, in *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 23 [(1974)], the Court had occasion to define "*de novo* proceeding" as a review that was "unfettered by any prejudice from the [prior] agency proceeding and free from any claim that the [agency's] determination is supported by substantial evidence." In *United States v. First City National Bank*, 386 U.S. 361,368 [(1967)], this Court observed that "review *de novo*" means "that the court should make an independent determination of the issues" and should not give any special weight to the [prior] determination of the administrative agency.

(Internal footnotes omitted). *See* ISCR Case No. 07-10396 (App. Bd., Oct. 2, 2008) and ISCR Case No. 07-07144 (App. Bd., Oct. 7, 2008). In ISCR Case No. 05-01820 (App. Bd. Dec 14, 2006), the Appeal Board criticized the administrative judge's analysis, supporting grant of a clearance for a PRC-related Applicant, and then decided the case itself. Judge White's dissenting opinion cogently explains why credibility determinations and ultimately the decision whether to grant or deny a clearance should be left to the judge who makes witness credibility determinations. *Id*. at 5-7. *See also* ISCR Case No. 04-06386 at 10-11 (App. Bd. Aug. 25, 2006)(Harvey, J., dissenting) (discussing limitations on Appeal Board's authority to reverse hearing-level judicial decisions and recommending remand of cases to resolve material, prejudicial error) and ISCR Case No. 07-03307 (App. Bd. Sept. 29, 2008). Compliance with the Agency's rules and regulations is required. *See United States ex. rel. Acardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *Lopez v. FAA*, 318 F.3d 242, 247-248 (D.C. Cir 2003); *Nickelson v. United States*, 284 F. Supp.2d 387, 390 (E.D. Va. 2003)(explaining standard of review).

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, "[W]hen 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:

> (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:
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> > (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; and
> >
> > (7) voting in a foreign election;
>
> (b) action to acquire or obtain recognition of a foreign citizenship by an American citizen;

Applicant moved to Australia in 1988. He applied for Australian citizenship when he joined the Australian Army in 1989. Australia granted him citizenship in November 1990 and he became a dual citizen of the U.S. and Australia. He served in the Australian Army for nearly 10 years. He will receive money from a superannuation program, to which he contributed funds when he was in the Australian Army. As a

citizen of Australia, he was required to vote in elections and did. The government has established a security concern under AG ¶¶ 10(a)(1)-(4), 10(a)(7), and 10(b).

AG ¶ 11 provides conditions that could mitigate security concerns. In this case, the potential applicable mitigating conditions are:

> (b) the individual has expressed a willingness to renounce dual citizenship; and
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> (e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

Applicant left Australia almost 11 years ago. Since that time, he has not exercised right of citizenship except to hold and use his Australian passport when visiting Australia. Six years ago, Applicant renounced his Australian citizenship when he learned it would impede his employment as a contractor at a federal facility. As of June 2003, Australia no longer considered him a citizen and his Australian passport became invalid. Since returning to the U.S., Applicant has exercised his rights of U.S. citizenship by voting in U.S. elections, paying taxes, and holding a U.S. passport. His recent actions support his testimony that he always considered himself a U.S. citizen and indicate his preference for the U.S. Applicant has mitigated the government's security concerns.

Whole Person Concept

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

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

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct,

but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

The mitigating evidence under the whole person concept is more substantial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, even if not specifically discussed. Applicant married an Australian-born woman in 1983 and their first daughter was born in 1985. His wife became very homesick and decided to return to Australia with their daughter, with or without Applicant. To preserve his family, Applicant resigned his commission in the U.S. Army and moved to Australia, a drastic move because at the time, it appeared it would be a permanent change of country. He would no longer live in the U.S., his homeland.

Applicant did not immediately find permanent work in corporate Australia. He talked with the Australian Army about joining based on his nearly 10 years of military experience in the U.S. Army. As a condition to joining the Australian Army, he applied for Australian citizenship, which Australia granted to him in November 1990. He made this decision, not for personal financial gain, but as a means to provide for his family and not be dependent upon his wife' parents for housing and other essentials of life. He wanted to be responsible for his family and he could take care of his family with a job in the Australian Army.

Applicant remained in Australia for nearly 10 years, working in the Australian Army until he decided to return to the U.S. He and his wife separated in 1996. Two years later, he decided to return to the U.S., his homeland. He did not immediately renounce his Australian citizenship upon his return to the U.S. Rather, he continued to use his Australian passport, a benefit of Australian citizenship, to visit his three children in Australia. Since his return to the U.S., he has exercised his rights of U.S. citizenship, which shows a preference for the U.S. Other than maintenance of his Australian passport, Applicant did not exercise any rights of Australian citizenship after he returned to the U.S.

In 2003, Applicant renounced his Australian citizenship and returned his Australian passport when he learned that his Australian citizenship interfered with his continued employment as a federal contractor. He made the decision to renounce his Australian citizenship because he considered himself a U.S. citizen first. He returned to the U.S. after his marriage ended because the U.S. was his homeland and his preferred place of residence. Although his employment spurred his decision to renounce his Australian citizenship, his renunciation was not purely for financial gain. Again, he needed to work to support his family and he had skills which were beneficial to the U.S. government. Prior to his renunciation, he had shown his preference for the U.S. by returning to the U.S., by working in the U.S., by marrying a U.S. citizen, and by raising his second family in the U.S. He has not indicated any intent to return to Australia. Rather, he has successfully worked to obtain U.S. citizenship for his two daughters and his still working towards U.S. citizenship for his son. His efforts to make sure his three older children have U.S. citizenship indicate again his preference for the U.S. over

Australia. While his decision 20 years ago to apply for Australian citizenship and join the Australian Army raises some concerns about his eligibility to hold a security clearance, these concerns are outweighed by the actions he has taken in the last 10 years, which shows a preference for the U.S., not Australia. The fact that he is entitled to a payment from a 401k type retirement program at age 55 does not show a preference for Australia over the U.S. He contributed money from his earnings to this program and will take the lump sum payment as soon as he is eligible to accept the payment. He invested his money in a retirement program and will receive a return on his investment at age 55.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under Guideline C.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

MARY E. HENRY
Administrative Judge