DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 08-07146
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric M. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

April 27, 2009

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline C (Foreign Preference), based on Applicant's possession of a Polish passport. Before the hearing, he surrendered his passport to his security officer. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on February 27, 2008. On January 27, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under 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 adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

Applicant received the SOR on February 3, 2009; answered it in an undated document, and requested a hearing before an administrative judge. DOHA received the request on February 6, 2009. Department Counsel was ready to proceed on March 3, 2009; and the case was assigned to me on March 11, 2009. DOHA issued a notice of hearing on March 13, 2009, scheduling the hearing for April 2, 2009. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified on his own behalf and submitted Applicant's Exhibit (AX) A, which was admitted without objection. The record closed upon adjournment of the hearing on April 2, 2009. DOHA received the transcript (Tr.) on April 15, 2009.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations in the SOR. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 31-year-old engineering assistant for a federal contractor. He has worked for his current employer since September 2007. He has never held a security clearance.

Applicant was born in Poland, and he came to the U.S. with his parents and brother in July 1994 (Tr. 19). He finished high school and took some college courses in the U.S. (Tr. 20). He became a U.S. citizen in June 2004. His mother became a U.S. citizen in December 2004, and his father became a U.S. citizen in May 2005. His only sibling, a brother, is a Polish citizen. His parents and his brother all live with him (Tr. 27).

Applicant's father was working in the U.S. until he was permanently disabled by a job-related injury (Tr. 25). His mother and brother are both employed in the U.S. (Tr. 25; GX 2 at 3).

Applicant was issued a Polish passport in June 2002, with an expiration date in June 2012. Applicant has never used his Polish passport, and he has no plans to visit Poland or live there (Tr. 20, 22, 28).

Applicant's parents own a home in Poland. In May 2008, he told a security investigator he kept his Polish passport because, if he inherited his parent's property, he would be subjected to higher taxes and expenses as a non-citizen (GX 2 at 3). In his response to DOHA interrogatories on September 16, 2008, he stated he intended to keep his Polish passport because it is the only form of identification that identifies him as a Polish citizen, and his Polish passport would "save [him] a lot of time and money" if he inherited his parents' property (GX 2 at 2).

At the hearing, Applicant testified his concern about avoiding taxes arose from conversations with his parents, but had not researched the applicable Polish law (Tr. 27-28). Neither Applicant nor Department Counsel presented any evidence on Polish law. Applicant admitted at the hearing that he did not know what would happen to the

property, because his parents had been living in the U.S. for 15 years, and it is possible they might sell it (Tr. 23).

Applicant testified he did not fully understand the implications of his Polish passport when he was interviewed by the security investigator and when he answered the DOHA interrogatories. Once he found out that the passport raised security concerns and that he could resolve them easily by surrendering his passport, he surrendered his Polish passport to his facility security officer (FSO), who will retain it until it expires or Applicant no longer needs a security clearance (Tr. 26; AX A).

Applicant testified he is willing to renounce his Polish citizenship (Tr. 23). When he surrendered his Polish passport, he inquired about the procedure for renouncing his Polish citizenship. He was informed that it costs "thousands of dollars," takes more than a year, and must be approved personally by the President of Poland. He concluded he is financially unable to pursue that option at this time (Tr. 18).

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a

determination as to the loyalty of the applicant. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Guideline C, Foreign Preference

The SOR alleges Applicant exercises dual citizenship with Poland and the U.S. (¶ 1.a); he possessed a Polish passport issued on June 13, 2002, that will expire on June 13, 2012 (¶ 1.b); and he will inherit property in Poland from his parents and his Polish passport will save him time and money (¶ 1.c). The concern under this guideline is set out in AG ¶ 9 as follows: "When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States." A disqualifying condition may arise from "exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen," including but not limited to "possession of a current foreign passport." AG ¶ 10(a)(1). A disqualifying condition also may arise from "using foreign citizenship to protect financial or business interests in another country." AG ¶ 10(a)(5).

Dual citizenship standing alone is not sufficient to warrant an adverse security clearance decision. ISCR Case No. 99-0454 at 5, 2000 WL 1805219 (App. Bd. Oct. 17, 2000). Under Guideline C, "the issue is not whether an applicant is a dual national, but rather whether an applicant shows a preference for a foreign country through actions." ISCR Case No. 98-0252 at 5 (App. Bd. Sep 15, 1999).

The security concern under this guideline is not limited to countries hostile to the U.S. "Under the facts of a given case, an applicant's preference, explicit or implied, even for a nation with which the U.S. has enjoyed long and peaceful relations, might pose a challenge to U.S. interests." ADP Case No. 07-14939 at 4 (App. Bd. Mar. 11, 2009).

Applicant's possession of an active Polish passport after becoming a U.S. citizen raises AG ¶ 10(a)(1). Department Counsel argued that AG ¶ 10(a)(5) is also raised, but the evidence supporting that argument is meager. Applicant has only an expectation of inheriting property; he has inherited nothing. He admitted he does not know in what form he will receive his inheritance. If the property is sold and the proceeds deposited in a U.S. institution or reinvested in the U.S., his Polish citizenship and passport will be irrelevant. Finally, there is no reliable evidence showing that his inheritance would be affected if he renounced his citizenship, because neither side presented any evidence of the applicable Polish law. The allegation in SOR ¶ 1.c is based solely on Applicant's answers in response to investigators' questions about his motivation for keeping his Polish citizenship and passport.

On the other hand, Applicant's answers to the investigators indicate he was initially reluctant to renounce his citizenship because he was concerned that it might affect his inheritance. AG ¶ 10(a)(5) focuses on an applicant's mindset, not the accuracy of his or her understanding of the situation. Recognizing that security determinations should err on the side of denying a clearance, I conclude that Applicant's subjective concern for his possible inheritance of property in Poland is sufficient to raise AG ¶ 10(a)(5).

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 10(a)(1) and (5), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns under this guideline may be mitigated by evidence that "dual citizenship is based solely on parents' citizenship or birth in a foreign country." AG ¶ 11(a). Security concerns also may be mitigated by if "the individual has expressed a willingness to renounce dual citizenship." AG ¶ 11(b). Finally, security concerns based on possession or use of a foreign passport may be mitigated if "the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated." AG ¶ 11(e). All of these mitigating conditions are established.

Whole Person Concept

Under the whole person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's

conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

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

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept. I have incorporated my comments under Guideline C in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant came to the U.S. with his family as a teenager, and has lived all his adult life in the U.S. He was candid and sincere at the hearing. When faced with a choice between his security clearance and the possibility that a future inheritance might be more complicated and expensive, he resolved the conflict in favor of his security clearance. He has never used his Polish passport, and he has no interest in returning to Poland. All of his immediate family lives with him in the U.S. His career aspirations are oriented on the U.S. The evidence clearly shows he prefers the U.S. over Poland.

After weighing the disqualifying and mitigating conditions under Guideline C, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on foreign preference. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25:

Paragraph 1, Guideline C (Foreign Preference):	FOR APPLICANT
Subparagraphs 1.a-1.c:	For Applicant

Conclusion

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

LeRoy F. Foreman
Administrative Judge