DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 09-01689
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Gina L. Marine, Esquire, Department Counsel
For Applicant: *Pro se*

May 25, 2010

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant is a dual citizen of the United States and Australia from birth, who was raised and educated in Australia. Despite his continuous employment in the United States since March 2001 and his marriage to a U.S. citizen in July 2005, he actively exercises his Australian citizenship by possessing and using an Australian passport to visit his family in Australia. Clearance is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on September 18, 2008. On September 4, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline C, Foreign Preference, that provided the basis for its preliminary decision to deny him a security clearance. 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) effective within the Department of Defense as of September 1, 2006.

Applicant responded to the SOR on September 17, 2009, and he requested a hearing. On September 25, 2009, the case was assigned to me to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On November 6, 2009, I scheduled a hearing for December 10, 2009.

I convened the hearing as scheduled. Three Government exhibits (Ex. 1-3) were admitted into evidence without objection. Applicant submitted two exhibits (Ex. A-B) that were also entered without objection, and he testified, as reflected in a transcript (Tr.) received on December 17, 2009.

Findings of Fact

DOHA alleged under Guideline C, Foreign Preference, that Applicant exercised dual citizenship by possessing an Australian passport issued in April 2007, that he obtained that passport despite possessing a U.S. passport issued in 2001, that he used his Australian passport to travel to Australia, that he did not intend to relinquish it, and that he intended to vote in Australian elections in order to maintain his Australian citizenship (SOR 1.a). Applicant admitted the exercise of his Australian citizenship as alleged. After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 31-year-old senior project engineer, who has worked for his current employer since August 2008. (Ex. 1.) He seeks a secret-level security clearance. (Ex. A, B.) He has never held a Department of Defense security clearance. (Ex. 1.)

Applicant has dual citizenship with his native Australia and with the United States from birth. (Tr. 25.) He has held both Australian and U.S. passports since about age two. (Ex. 2.) His mother is a native Australian citizen. Applicant's father possesses citizenship with his native United States, and with Australia, where he chose to make his home. Applicant was raised in Australia (Tr. 25.) with his two sisters, who also possess dual citizenship with Australia and the United States. Applicant's parents and siblings reside in Australia. (Tr. 30.) His father is now retired from teaching, but his mother and one sister are currently employed as educators. His other sister is a nurse at a hospital in Australia. (Ex. 1, 2.)

In December 2000, Applicant earned his B.S. degree in civil engineering from an Australian university. He elected to begin his career as an engineer in the United States. (Ex. 1.) He wanted to see the United States, experience the culture, and connect with some of his father's family here, so he responded to a U.S. firm's efforts to recruit Australian engineering students. (Tr. 35-36.) In January 2001, he renewed his U.S. passport, which he used to enter the United States in March 2001. (Tr. 25.) Applicant worked for a succession of four employers in the private sector until August 2008, when he started his present employment requiring a security clearance. (Ex. 1.)

About six months after he came to the United States, Applicant met his spouse, who is a native U.S. citizen and not eligible at this point to become an Australian citizen. (Tr. 28, 36.) They married in the United States in July 2005, and their daughter was born here in November 2006. On Applicant's application, his daughter was granted Australian citizenship, so she has dual citizenship with the United States and Australia. (Ex. 1, Tr. 27.) In 2007, Applicant and his spouse purchased their current residence in the United States. He and his spouse own two cars, and he has 401(k) accounts and bank accounts in the United States. (Tr. 38.)

Applicant traveled to Australia to visit his parents and sisters about every other year, including in August 2003, September 2005, June 2007, and April 2009. The trips in 2007 and 2009 were to attend his sisters' weddings. (Ex. 1, 2, Tr. 32.) He entered and exited Australia on his Australian passport, which was last renewed in April 2007 for another ten years. (Ex. 3, Tr. 30.) Applicant used his Australian passport because he is required to do so as an Australian citizen under Australian law. (Ex. 2, Tr. 30.) Applicant used his U.S. passport on reentry into the United States. (Ex. 2, Tr. 31.) Applicant traveled to Europe in 2002. He believes he traveled on his U.S. passport because he was not required to obtain a visa, although he is not certain. (Tr. 31.)

On September 18, 2008, Applicant applied for a security clearance. On his e-QIP, he disclosed his dual citizenship with the United States and Australia, his possession of valid passports with both countries, and his trips to Australia to see his family. (Ex. 1.) On December 19, 2008, Applicant was interviewed by a government investigator about his ties to Australia. Applicant indicated that he maintained his Australian citizenship because his family still resides in Australia and he hoped to move back to Australia in the future. He asserted that his allegiance to Australia and the United States was equally divided, and that he harbored no ill feelings toward either country. Applicant indicated that he was required to vote in Australian elections in order to maintain his citizenship, so he intended to vote in future Australian elections. He stated that he would not be willing to renounce his Australian citizenship or relinquish his Australian passport in order to obtain a security clearance. Applicant told the investigator that he held an Australian passport because it was required for him to travel to Australia as an Australian citizen, and it was more important to him to visit his family and be able to return to Australia to live in the future if he chose. (Ex. 2.)

Applicant voted in an Australian election in 2000, as Australian law requires all resident citizens of eligible age to vote or be subject to criminal penalties. He has not voted in an Australian election since moving to the United States in March 2001. In 2002 or 2003, Applicant applied for, and was granted, a waiver from the voting requirement based on his status as a nonresident of Australia. (Tr. 25-26, 28-29.) He does not intend to vote in an Australian election as a nonresident. He testified that he likely misunderstood the inquiry of the government investigator if he had indicated that he was required to vote in an Australian election to maintain his Australian citizenship. (Tr. 34.)

Applicant reads an Australian newspaper once or twice a week to "catch up on what's going on." (Tr. 40.) Applicant has no financial assets in Australia. He closed his

bank accounts there "a number of years ago." (Tr. 34, 41.) Should he reestablish residency in Australia, he would be required to repay some of the costs of his education in Australia through a tax on his earned income there. (Tr. 42.)

Applicant registered to vote in the United States in late 2008. He had not voted in an election in the United States "just through pure laziness." (Tr. 34-35.) He pays taxes in the United States. (Tr. 35.)

As of December 2009, Applicant was not willing to relinquish his Australian passport ("It's the country I was born in, so I would like to hold onto that connection."). He expects to return to Australia around Christmas 2011 to visit his family. (Tr. 32, 44-45.). Applicant has not checked into whether he could surrender his Australian passport and remain an Australian citizen. (Tr. 46.) He is aware that he would be required to obtain a visa to enter Australia on his U.S. passport, and would be limited in the length and number of times that he could visit. (Tr. 44-45.) Applicant testified that while he grew up in Australia, he always had a "strong connection" to both the United States and Australia because he had an American father and an Australian mother. He does not see a reason to prefer one country over the other. (Tr. 33.)

Applicant's current supervisor is familiar with Applicant's work performance and work ethic since July 2006. He served as Applicant's direct supervisor at their previous employment. When this supervisor changed firms, he hired Applicant to work for him in their present employment. He has found Applicant to be hard-working, honest, and conscientious, and he recommends that Applicant be granted the secret-level security clearance that he needs to support engineering projects for the U.S. government. (Ex. B.) In the opinion of the company's senior vice president in charge of Applicant's department, Applicant has become instrumental in supporting engineering projects at locations throughout the world. (Ex. A.)

I took administrative notice, *sua sponte*, of historical facts about Australia and its relations to the United States.[1] Australia is a democracy with a parliamentary government. It is a founding member of the United Nations and respects the civil rights of its citizens. Shared democratic values, and similarities in cultural and historical background, have made relations between the United States and Australia exceptionally strong and close. Australian forces have fought beside the United States and other allies in every significant conflict since World War I. Australia was one of the earliest participants in Operation Enduring Freedom, and Australian troops are currently

[1]Administrative or official notice is the appropriate type of notice used for administrative proceedings. *See* ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004)); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings is to notice facts that are either well known or from government reports. *See* Stein, ADMINISTRATIVE LAW, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice). Requests for administrative notice may utilize authoritative information from the internet. *See, e.g. Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006) (citing internet sources for numerous documents). In this case the source for the facts is the U.S. Department of State, *Background Note: Australia*, Nov. 23, 2009, which is available at http://www.state.gov.

deployed in Afghanistan. Australia has an advanced market economy and is an active trading partner of the United States. The United States and Australia share a wide range of common interests and similar views on most international questions.

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered 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 overarching adjudicative goal is a fair, impartial and commonsense 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. Under Directive ¶ E3.1.14, the government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion when seeking to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Foreign Preference

The security concern about foreign preference is set out in AG ¶ 9:

> When an individual acts in such a way 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.

Applicant is a dual citizen of the United States and Australia based on his birth in Australia to a father with U.S. citizenship. His renewal, use, and ongoing possession of an active Australian passport after moving to the U.S. for employment in 2001 raises significant issues of foreign preference under AG ¶ 10(a)(1), "exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to: (1) possession of a current foreign passport." AG ¶ 10(a)(7), "voting in a foreign election," has limited applicability under the facts of this case. Applicant's voting in an Australian election was an active exercise of his Australian citizenship when he also held U.S. citizenship. But for all practical purposes, his U.S. citizenship was nominal before he came to the United States in 2001, and he has not voted in an Australian election since 2000. Although Applicant had previously indicated that he intended to vote in an Australian election to maintain his Australian citizenship, he clarified at his hearing that it was required only if he resumed residency in Australia. He otherwise had no intent to vote in a foreign election, and his application for a waiver from the voting requirement warrants a finding for him as to SOR 1.a(5).

Department Counsel argued for application of AG ¶ 10(b), "action to acquire or obtain recognition of a foreign citizenship by an American citizen," based on Applicant's renewal of his Australian passport. Because Applicant is an Australian native citizen who held an Australian passport since he was two years old, his renewal of that passport is covered under AG ¶ 10(a) rather than AG ¶ 10(b). This is not a case where Applicant applied for a foreign citizenship as a U.S. citizen. Furthermore, while Applicant stated that he has equal allegiance to the United States and Australia, he has not made any statement or taken any action indicating that he does not have allegiance to the United States. To the contrary, he has chosen to reside here with his young family, and pursue his career here. While he has not voted in a U.S. election, he pays taxes in the United States. Statements of equal allegiance fall short of establishing AG ¶ 10(d), "any statement or action that shows allegiance to a country other than the United States: for example, declaration of intent to renounce United States citizenship; renunciation of United States citizenship."

Of the potentially mitigating conditions, AG ¶ 11(a), "dual citizenship is based solely on parents' citizenship or birth in a foreign country," applies because Applicant acquired Australian citizenship by birth. But AG ¶ 11(a) does not mitigate the foreign preference concerns raised by his renewal and use of his Australian passport after he moved to the United States. His choice to renew his foreign passport indicates

preference for his native Australia, even if his motivations were apolitical, *i.e.*, to visit family without time limitations imposed on foreigners, to preserve his future options for residency and employment, and to comply with the requirements of his Australian citizenship. Applicant has taken no steps to obtain official U.S. approval for use of his Australian passport, which is required under AG ¶ 11(d), "use of a foreign passport is approved by the cognizant security authority." Whereas he continues to possess an Australian passport that is valid until April 2017, and is likely to renew it, AG ¶ 11(e), "the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated," also does not apply.

Applicant is not willing to renounce his Australian citizenship, so AG ¶ 11(b), "the individual has expressed a willingness to renounce dual citizenship," is not pertinent. While Applicant is not required to renounce his dual citizenship for access to classified information, his possession of a foreign passport raises unacceptable risks of foreign travel unverifiable by the United States.

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 his conduct and all relevant circumstances in light of 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 commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

There are significant factors supporting approval of Applicant's access to classified information. Applicant's foreign preference concerns relate to Australia, which has a democratic government and is a close ally of the United States. He has continuously worked and resided in the United States since March 2001. He is married to a U.S. citizen, has a daughter born in the United States, and owns his home in the United States. At the same time, he has strong, emotional and familial ties to his native Australia. He makes an effort to get caught up on what is happening in Australia by reading Australian newspapers on a regular basis. He obtained Australian citizenship for his young daughter. He remains unwilling to surrender his Australian passport for a security clearance. While it is understandable that he would want to retain ties to the country where he was born and raised, his failure to inquire about whether it would be

possible for him as a dual citizen to enter Australia on his U.S. passport is telling of a preference for Australia.

By all accounts, Applicant is a law-abiding citizen of good character. But he failed to carry his burden of mitigating the foreign preference security concerns. Even the best of allies do not always share the same interests, and Applicant has not persuaded me that he can be counted on to make decisions free of any concern for his native Australia.

Formal Findings

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

Paragraph 1, Guideline C:	AGAINST APPLICANT
Subparagraph 1.a(1):	Against Applicant
Subparagraph 1.a(2):	Against Applicant
Subparagraph 1.a(3):	Against Applicant
Subparagraph 1.a(4):	Against Applicant
Subparagraph 1.a(5):	For Applicant

Conclusion

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

Elizabeth M. Matchinski
Administrative Judge