



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
) ISCR Case No. 10-00957
)
)
Applicant for Security Clearance)

Appearances

For Government: Marc G. Laverdiere, Esquire, Department Counsel
For Applicant: John J. McGivney, Esquire
David B. Stanhill, Esquire

July 22, 2011

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant is the chief executive officer of a defense contracting firm that he started in the United States in 1989. He and his spouse lived in their native Republic of South Africa from 1992 to 1993, while he was employed as a university professor. Foreign preference concerns raised by his acquisition of a South African passport as a U.S. citizen are mitigated because he held a reasonable belief it would not be granted and his intent was to obtain a denial so that he could enter South Africa on his U.S. passport; he did not travel on the South African passport that was issued to him; and he has returned that passport to the South African government. His ownership of substantial financial interests in South Africa do not raise foreign preference concerns where he is not using foreign citizenship to protect those interests. His former service in the South African military occurred before he became a U.S. citizen. Clearance granted.

Statement of the Case

On October 8, 2010, 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, and Guideline B, Foreign Influence, which provided the basis for its preliminary decision to deny him a security clearance. DOHA took the action 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 on September 1, 2006.

Applicant responded to the SOR on October 14, 2010, and he requested a hearing. On January 4, 2011, 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 January 6, 2011, I scheduled a hearing for January 25, 2011. On January 18, 2011, leading counsel for Applicant entered his appearance and requested a one-month continuance to give him time to prepare. I granted the continuance, and on February 4, 2011, I rescheduled the hearing for March 15, 2011.

I convened the hearing as rescheduled. Before the introduction of any evidence, I was notified that the Government had amended the SOR on December 10, 2010, to strike Guideline B and to allege under Guideline C instead of Guideline B that Applicant held financial accounts and owned property in South Africa, and that he traveled there several times between 2002 and 2009. Four Government exhibits (GE 1-4) and 15 Applicant exhibits (AE A-O) were admitted into evidence without objection. Applicant and two witnesses also testified on his behalf, as reflected in a transcript (Tr.) received on March 23, 2011.

Post-hearing Rulings

On June 17, 2011, Applicant's counsel forwarded correspondence received from the South African Consulate General in response to Applicant's application to renounce South African citizenship (AE J, K). I reopened the record on June 23, 2011, for the Government to comment on proposed Applicant exhibit P (AE P). On June 27, 2011, Department Counsel indicated the Government had no objection to its admission. Accordingly, the document was entered into evidence.

Findings of Fact

The amended SOR alleged under Guideline C, Foreign Preference, that Applicant obtained a South African passport on June 20, 2009, as a U.S. citizen (SOR 1.a); that he exercised dual citizenship by possessing that passport (SOR 1.b); that he served in the South African Army as a reserve officer from 1975 to 1995 (SOR 1.c); that he has assets on deposit in South Africa totaling about \$6,500 (SOR 1.d); that he owns real estate in South Africa valued around \$520,000 (SOR 1.e); and that he repeatedly traveled to South Africa between 2002 and 2009 (SOR 1.f).

Applicant responded to the amended allegations on January 14, 2011. He explained the circumstances under which he acquired the South African passport despite the fact he lost his South African citizenship when he became a U.S. citizen. Applicant admitted that he owned property and had bank accounts in South Africa, and that he has frequently visited South Africa to see family members. Applicant's admissions are incorporated as findings of fact. After considering the pleadings, exhibits, and transcript, I make the following additional findings of fact.

Applicant is a 55-year-old chief executive officer (CEO) and chief technology officer (CTO) of his own company, which he started in October 1989. (GE 1; AE A; Tr. 45.) His company has 20 employees, of whom 14 are professionals and six are support staff. Gross revenues for the corporation are projected to be at least \$5 million in 2011, and Applicant is the controlling shareholder of the stock in his corporation. (Tr. 57-59.) A branch of the U.S. military has requested that Applicant's facility be granted a security clearance for a specific program on which Applicant would have access to classified information. (Tr. 57.)

Applicant was raised in his native South Africa with his two brothers and three sisters. (Tr. 41.) In 1974, Applicant served one year of compulsory military service in the South African Army at the enlisted rank. He was assigned to a parachute battalion. At the end of December 1974, Applicant was honorably discharged into the citizen force (reserves) as an officer attached to a parachute battalion. He was required to serve in military camps lasting from 30 to 60 days yearly. (GE 1, 2; AE A, D; Tr. 77-78.)

Applicant earned his undergraduate degree in physics and applied mathematics from a South African university in 1977. He completed honor studies in 1978 before attending another university in South Africa for graduate studies in mechanical engineering. He was awarded his master's degree in early 1982. In August 1983, he married his spouse, who is also a South African native, before coming to the United States that fall to pursue a master's degree in aeronautics and astronautics at a private technological university (hereafter university X).¹ (GE 1; AE A; Tr. 43, 46-47.) Applicant had breaks in his citizen force service for South Africa while in the United States for his schooling. (GE 2; AE D.)

After Applicant obtained his master's degree from university X in 1985, he went home to South Africa. He last served in a military camp in South Africa in 1986, although he was not formally discharged from its citizen force until November 1995. (GE 2; AE D; Tr. 78, 89.) In January 1987, Applicant returned to the United States for doctoral studies at university X. Applicant had a paid research assistant position that partially covered the costs of his Ph.D. degree. He was awarded his doctorate in June 1989. (GE 1; AE A; Tr. 46-47.)

Applicant had worked with "smart materials" while pursuing his doctorate, and he started a corporation involving that technology in the United States in October 1989.

¹See GE 1, AE A and J.

Applicant's company contracted university X on an experiment involving the space shuttle. In the early 1990s, the company also had a small business innovative research contract with the U.S. government to develop a rubber product that could control vibrations. (Tr. 48-49.)

In 1992, Applicant returned to South Africa for an academic appointment at the university from which he had obtained his mechanical engineering degree. (GE 1; AE A; Tr. 49, 85.) Applicant taught classes in structural and vehicle dynamics unrelated to his company's work for the U.S. government. (Tr. 86-87.) His spouse wanted to be close to her family, and he anticipated an indefinite stay. Applicant left a co-owner in charge of his U.S. company, although business was dormant. (Tr. 115-16.) After only one year, Applicant and his spouse moved permanently to the United States because of his desire to be involved in cutting-edge technology. (Tr. 49-50.) Unable to take his pension funds out of South Africa (Tr. 70-72), Applicant decided to invest in property there. During the 1993 to 1994 time frame, he bought a vacation home for \$36,000 USD at a seaside resort and an undeveloped parcel adjacent to the home for \$50,000. In 1995 or 1996, he bought another house in South Africa at an auction for \$30,000. His parents-in-law currently reside in the home, which is up the road from his vacation home. (Tr. 69-71.) Sometime later, he purchased land close to his parents-in-law's residence to protect the view.² (Tr. 72.) Around September 2003, Applicant and three of his South African friends bought a home together in South Africa as an investment. Applicant's contribution was about \$40,000. (GE 1; AE 1; Tr. 71.) Applicant maintained checking and savings accounts in South Africa, into which he transferred no more than \$10,000, to pay the taxes and utilities on his properties in South Africa. He also had a dormant money market account. (Tr. 68-69.)

Since moving to the United States, Applicant has been primarily engaged in the operations of his company. The corporation continued to acquire new contracts, including from the U.S. government. (GE 1; AE A; Tr. 53-55.) From September 1995 to May 2007, Applicant was also a part-time lecturer at university X. In late June 1995, he and his spouse purchased their first home in the United States for \$154,000. (GE 1; AE A, L.) In September 1995, Applicant renewed his South African passport for another ten years. (GE 1; AE A.)

In November 2001, Applicant and his spouse became naturalized U.S. citizens. (GE 1; AE B; Tr. 58.) Applicant felt he had become part of the United States ("If you live off the land, you become part of the land"). (Tr. 79.) Applicant's children, who were under age 18 and residing in the United States, automatically acquired U.S. citizenship.³ Unbeknownst to

²When asked about his property ownership in South Africa, Applicant responded, "I have two houses, the one that I share some part in, and then I have land, one, two, three, four." He described the two houses that he owned outright, his part-ownership of another house, and his ownership of two parcels of undeveloped land in South Africa located near his homes. (Tr. 69-72.) On his e-QIP, he had indicated that he owned four parcels of land at the seaside resort in South Africa, which were purchased around 1988 for \$30,000, 1993 for \$50,000 (likely the land adjacent to his vacation home), 2004 for \$50,000, and 2005 for \$50,000. (GE 1; AE A.) Applicant used his in-laws' pension assets to purchase the last parcel. In return, he pays them a monthly income to cover their living expenses. (Tr. 82-83.)

³Title 8, Section 1431 of the United States Code provides as follows:

Applicant at that time, under the South African Citizenship Act 88 of 1995, Applicant and his spouse lost their South African citizenship when they took the oath of naturalization in the United States.⁴ (GE 1; AE A, H; Tr. 112.) Yet, Applicant continued to maintain a South African driver's license, which he last renewed in May 2006 for another five years. (AE J.)

Applicant's mother and four of his siblings are resident citizens of South Africa. His other sister is a lecturer at a university in Namibia. (Tr. 41-43.) Applicant has traveled to South Africa about 18 times to visit family (in July 2009 for his father's funeral) since December 2002, including in December 2010. (GE 1, 4; AE A, E; Tr. 61.) In October 2006, he obtained his U.S. passport, and he used it to enter South Africa in April 2007 and October 2007. (GE 4; AE E.) On Applicant's next trip in March 2008, South African passport control noted his South African birth. He was allowed to enter the country on his

(a) A child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:

(1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.

(2) The child is under the age of eighteen years.

(3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

(b) Subsection (a) of this section shall apply to a child adopted by a United States citizen if the child satisfies the requirements applicable to adopted children under section 1101(b)(1) of this title.

Section 1101(b)(1) provides in pertinent part:

The term "child" means an unmarried person under twenty-one years of age who is-
(E)(i) a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years or if the child has been battered or subject to extreme cruelty by the adopting parent or by a family member of the adopting parent residing in the same household: Provided, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter.

⁴Chapter 3 Section 6 of the South African Citizenship Act 88 of 1995 provided for the loss of citizenship, as follows:

(1) Subject to the provisions of subsection (2), a South Africa citizen shall cease to be a South African citizen if—

(a) he or she, whilst not being a minor, by some voluntary and formal act other than marriage, acquires the citizenship or nationality of a country other than the Republic; or

(b) he or she in terms of the laws of any country also has the citizenship or nationality of that country, and serves in the armed forces of such country while that country is at war with the Republic.

(2) Any person referred to in subsection (1) may, prior to his or her loss of South African citizenship in terms of this section, apply to the Minister to retain his or her South African citizenship, and the Minister may, if he or she deems it fit, order such retention.

(AE H.) Neither Applicant nor apparently his spouse applied to retain South African citizenship before becoming naturalized in the United States. However, their children were both minors when they acquired U.S. citizenship and have dual citizenship with South Africa and the United States. (GE 1; AE A.)

U.S. passport but was warned to renew his South African passport. A border official wrote in Applicant's U.S. passport, "WARNED TO RENEW SA PASSPORT!!!" South African citizenship laws made it a criminal offense for South African citizens to enter or exit the country using a foreign passport.⁵ (GE 4; AE E,G, H; Tr. 63.) Applicant did not have time to renew his South African passport because of the brevity of his stay. (Tr. 63.)

Applicant returned to South Africa on April 26, 2009, for a two-week visit. He was aware of the criminal penalty for a South African citizen to use a foreign passport, but also that he had not filed for the necessary permission to retain his South African citizenship before taking the oath of naturalization in the United States. He was advised by South African border control to apply for his South African passport with the understanding that it would be rejected. He could then prove that he was not a citizen of South Africa, and that he could legally enter the country on his U.S. passport. Anticipating a denial, Applicant applied to renew his South African passport during his stay. (AE G; Tr. 110.) After he submitted his application (Tr. 104.), he discussed it with his sister, who, as a lawyer employed by the South African government, had a part in drafting the citizenship law. She believed that his passport almost certainly would not be renewed. (Tr. 65-66.) To their surprise, Applicant's South African passport was renewed in June 2009 for ten years. (GE 4; AE I.) Unaware that his South African passport had been renewed, Applicant traveled to South Africa on his U.S. passport in July 2009 for his father's funeral. (GE 1, 4.)

On September 30, 2009, Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) version of a security clearance application, on which he indicated that he lost his South African citizenship "immediately" when he acquired his U.S. citizenship. He disclosed his contacts with several family members and friends living in South Africa or Namibia, his foreign travel since 2002, and his financial and real estate holdings in South Africa. Applicant indicated that he held a South African passport in the past, which expired in September 2005. He did not disclose that he had applied to renew it because he anticipated a denial. (GE 1; AE A; Tr. 111-12.)

On November 24, 2009, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM) about his foreign military service and his foreign financial assets. Applicant indicated that on his U.S. naturalization, he became a "permanent resident" of South Africa ineligible to serve in its military, to hold its passport, or to vote in its elections. He "missed the window of opportunity" to retain his South African citizenship. Applicant estimated he had about \$6,500 in total deposits in his three accounts

⁵ The South African Citizenship Act was amended in 2004 to add Section 26B as follows:

A major citizen who—

(a) enters the Republic or departs from the Republic making use of the passport of another country; or

(b) while in the Republic, makes use of his or her citizenship or nationality of another country in order to gain an advantage or avoid a responsibility or duty,

Is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 12 months. (AE H.)

Sometime after that trip but before his next trip in April 2009, Applicant apparently learned of the criminal penalties for citizens of South Africa to use a foreign passport. (Tr. 100.)

in South Africa, and he owned about \$520,000 in real estate assets in South Africa. (GE 2; AE D.)

In December 2009, Applicant went to South Africa for a family visit, traveling on his U.S. passport. (GE 4; AE E.) Applicant had his mail in South Africa, such as the tax bills on his South African properties, sent to his parents' mailbox. (Tr. 105.) When he retrieved his mail during that trip in December 2009, he discovered that his South African passport had been renewed. (Tr. 67-68.) Yet, Applicant exited South Africa on his U.S. passport in early January 2010. He also used his U.S. passport on a brief vacation to a game reserve in South Africa with a friend in late February 2010. (GE 4; AE E; Tr. 73.) Applicant did not ask the South African consulate or other authority why he had been granted a South African passport as a U.S. citizen. (Tr. 120.) Nor did he check with anyone in the U.S. government to see whether his possession of a foreign passport would be appropriate in light of his application for a security clearance. (Tr. 121.) However, he did not use the South African passport.

Around March 2010, DOHA asked Applicant about any contact with a foreign embassy or consular officials. Applicant responded on March 9, 2010, that he had applied to renew his South African passport in April 2009. While he had expected his request to be denied, he learned during his vacation trip to the country in December 2009 that the passport was issued. He added that he had not used the South African passport. He expressed a willingness to renounce his South African citizenship and to destroy the passport if necessary for him and his company "to make a contribution to the systems that are used to defend and protect our country." (GE 2, 3; AE C, D.) On March 30, 2010, Applicant provided DOHA with copies of his South African and U.S. passports. He reiterated his willingness to renounce his foreign citizenship if necessary to obtain a clearance. (GE 4.)

In February 2011, Applicant filed an application with the South African consulate to renounce South African citizenship based on his acquisition of U.S. citizenship. He submitted with his application his South African passport issued in June 2009. (AE J; Tr. 72.) On February 25, 2011, the South African Consulate-General acknowledged receipt of Applicant's application for renunciation. (AE K.) On May 11, 2011, the South African Department of Home Affairs notified Applicant through the Consulate-General that renunciation of South African citizenship was not applicable because he had ceased to be a South African citizen when he acquired his U.S. citizenship in November 2001. However, as a former South African citizen by birth, Applicant automatically retained his right to permanent residence in South Africa. (AE P.)

Applicant's vacation home in South Africa is vacant, although on occasion he lets friends use it. (Tr. 69.) Applicant estimates its present value at \$100,000. His parents-in-law reside in his other house, which is worth between \$80,000 and \$100,000. (Tr. 70-71.) Applicant has promised his in-laws that they can remain there. (Tr. 96.) He owns the homes outright and has no mortgages on the properties. As for his quarter share of the third residential property, the other co-owners inquired about buying him out, and his share is on the market. He also has a parcel of land in front of his parents' old house listed for

sale. (Tr. 107-08.) Applicant intends to bring the funds from any sale to the United States. (Tr. 83.)

Applicant does not foresee himself returning to South Africa permanently, at least not before retirement. (Tr. 96.) Applicant would consider moving to South Africa if his children, who are now 13 and 18, decided to return to South Africa as adults. (Tr. 97.) Because he holds permanent legal residency status in South Africa, he has no need or intent to renounce his U.S. citizenship if he resides in South Africa in the future. (Tr. 109.)

Applicant and his spouse bought their present home in the United States in July 2009 for \$498,000. (Tr. 44.) The property is presently assessed at \$471,000 for tax purposes. They kept their previous house in the United States as a rental property. That property has an assessed value of \$315,800. (AE L; Tr. 75-76.) Applicant has 401(k) assets totaling around \$220,000 in the United States. (Tr. 76.) Applicant's spouse has worked for the past six years for his company as a human resources employee. She had no prior employment outside the home. (Tr. 76-77.) Applicant's children attend their local public schools. (Tr. 50-51.) Applicant and his spouse are members of a nonprofit boat club located on state land. Applicant serves as a member of the boat club's board, and he has been involved in ensuring that the club satisfies its federal and state reporting requirements. (Tr. 130-31, 137-40.) Through the boat club, Applicant and his spouse have become very good friends with another family in their town. (Tr. 132.)

On an annual basis since September 2006, Applicant has participated in parachute jumps in Europe commemorating the anniversary of a significant World War II Allied operation which involved South African paratroopers in British units. (GE 1; AE A; Tr. 78-79, 89-91.) He traveled to Europe on his U.S. passport. (GE 4; AE E.)

South Africa is a parliamentary democracy which has made remarkable progress in consolidating the nation's peaceable transition post-apartheid. Its society is undergoing a rapid transformation but challenges are likely to persist in eliminating the economic and societal disparities caused by apartheid and the country's international isolation until the 1990s because of its discriminatory policies. South Africa has a productive and industrialized economy that exhibits many characteristics associated with developing countries, such as a division of labor between formal and informal sectors, and uneven distribution of wealth and income. South Africa has made progress in dismantling its old economic system based on import substitution, high tariffs and subsidies, anticompetitive behavior, and extensive government intervention. Foreign exchange controls applicable only to South African residents have been gradually reduced. Private citizens are now allowed a one-time investment of up to 2 million rand in offshore accounts. Since the abolition of apartheid and democratic elections in April 1994, South Africa has enjoyed a solid bilateral relationship with the United States. Differences in political positions between the two governments have not impeded cooperation in counterterrorism, fighting HIV/AIDS, and military relations. U.S.-South African economic and trade relations remain strong. (Ex. N.) South Africa is not known to aggressively target U.S. sensitive information. (Ex. O.)

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.

AG ¶ 10(a), “exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizenship of a family member,” lists several actions usually, but not always, associated with foreign citizenship that can raise foreign preference concerns. Applicant applied to renew his expired South African passport as a U.S. citizen in May 2009. His renewal of his foreign passport raises foreign preference issues under AG ¶ 10(a)(1), “possession of a current foreign passport,” even though he did not anticipate its issuance, and he applied only after border officials had directed him to do so. However, AG ¶ 10(b), “action to acquire or obtain recognition of a foreign citizenship by an American citizen,” is not fully established where his intent was to obtain confirmation that he was not a South African citizen and therefore legally entitled to enter the country on his U.S. passport.

Nonetheless, the security concerns raised by Applicant’s decision to apply for the foreign passport cannot be easily dismissed. In March 2008, he was warned orally, and in writing entered on his U.S. passport, to renew his South African passport. Over the next year, he did not ask the South African government to confirm the loss of his South African citizenship. When he returned to South Africa in April 2009, he was warned again to renew his South African passport. He applied for it within a week or two without inquiring of the South African government or his sister, who had a part in drafting the citizenship laws, whether there was an alternative means of proving he did not hold South African citizenship. After he discovered that the foreign passport had been issued to him in December 2009, he did not inquire about the passport’s validity, even as its issuance called into question his understanding of South African citizenship laws, which provided for the loss of South African citizenship on obtaining another nationality. His silent retention of the South African passport suggests a desire for, or at least no objection to, dual citizenship status, which could be inferred from the issuance of the South African passport.

But to Applicant’s credit, he refrained from using the foreign passport. He traveled to South Africa in 2010 on his U.S. passport, which is an act in preference of his U.S. citizenship. He expressed a willingness to renounce his South African citizenship and to relinquish the foreign passport in response to DOHA interrogatories in March 2010 and again in response to the SOR. When he applied to renounce South African citizenship (which, as confirmed by the Consulate-General, was inapplicable to him), he returned his South African passport to the South African government. His actions satisfy AG ¶ 11(e), “the passport has been destroyed, surrendered to the cognizant security authority or otherwise invalidated.” AG ¶ 11(b), “the individual has expressed a willingness to renounce dual citizenship,” applies in that he gave up the citizenship of his birth nation in November 2001. By voluntarily acquiring U.S. citizenship, and traveling solely on his U.S. passport, he demonstrated a preference for the United States in a very important aspect.

Foreign military service can reflect a foreign preference (See AG ¶ 10(a)(2), “military service or willingness to bear arms for a foreign country”), but Applicant’s un rebutted

testimony is that he was discharged from this military obligation in 1995, before he became a U.S. citizen. Any foreign preference concerns raised by him remaining in the inactive citizen force of South Africa, after he had established permanent residency in the United States around 1993, are mitigated under AG ¶ 11(c), “exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor.” Applicant’s active duty service occurred so long ago that it is of little current significance in assessing whether he can be counted on to protect sensitive information.

Applicant owns real estate in South Africa valued around \$520,000, and he has about \$6,500 on deposit in accounts in South Africa from which he pays his property taxes. It is unclear whether his real estate holdings in the United States exceed those in South Africa. He owns the properties in South Africa outright. The equity in his two homes in the United States cannot be determined from the property tax records available for review and he was not asked about any mortgage loans. Given his majority stake in his business with its projected gross earnings of \$5 million this year, and his 401(k) assets of \$220,000, Applicant has a greater professional and financial stake in the United States. Nonetheless, his foreign financial interests are substantial, especially given his desire to keep his vacation home there and his promise to his in-laws that they can reside in his other residence until their deaths. The issue under Guideline C is not whether Applicant can be pressured or influenced because of his financial interests in South Africa, but rather whether he is acting to protect his foreign assets in such a way to indicate a preference for South Africa. See AG ¶ 10(a)(5) (stating, “using foreign citizenship to protect financial or business interests in another country”). AG ¶ 10(a)(5) does not apply. Applicant does not hold South African citizenship. While he retains permanent residency by operation of law based on his birth in South Africa, there is no evidence that he is using his permanent residency status to obtain a favorable tax or ownership benefit that would otherwise be unavailable to him as a U.S. citizen who lacks the right to return to live permanently in South Africa.

Applicant’s frequent travel to South Africa reflects the strong personal ties that he understandably shares with his family members who are resident citizens of South Africa. It is difficult to see where it indicates a preference for South Africa in light of his continuous residency in the United States since 1993, his voluntarily acquisition of U.S. citizenship in 2001, and his use of a U.S. passport to enter and exit South Africa.

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 several factors supporting approval of Applicant's access to classified information. Applicant's foreign preference concerns relate to South Africa, which has had a good bilateral relationship with the United States since the abolition of apartheid. Applicant received his graduate education in the United States, and even before he became a permanent resident, he had started a corporation in the United States which employs around 20 persons in work of significant benefit to the U.S. military. He and his spouse became U.S. citizens in November 2001, and he has traveled on his U.S. passport exclusively, even to South Africa. Even with respect to his renewal of his South African passport, his intent was not to obtain recognition of foreign citizenship, but to obtain a decision denying him the passport so that he prove he was not a citizen of South Africa,

Applicant retains strong familial and financial ties to his native South Africa. One of Applicant's sisters is a lawyer employed by the South African government, although not in a position with security, military, or intelligence implications. The Government apparently did not find that these ties significantly heightened his risk of foreign influence, presumably because of the good relations between his native and his adopted countries. It is nonetheless appropriate to consider these ties under a whole-person assessment of his security clearance eligibility. After becoming a U.S. citizen, Applicant purchased a quarter-interest in a resort property in South Africa, and he used assets from his parents-in-law to purchase an undeveloped parcel of land as a favor to them. He also continues to travel to see his relatives once or twice a year. He plans to retain his vacation home in South Africa, even though he has other property listed for sale.

But Applicant made a clear choice when he persuaded his spouse to move permanently to the United States in 1993. He left an academic position at the university for the opportunity of more challenging work in the United States. He did not look to see if there was a possible way he could retain his South African citizenship before he took the oath of naturalization in the United States. Applicant is not likely to jeopardize his company or his family in the United States by acting inconsistent with his fiduciary obligations.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the amended 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
Subparagraph 1.f:	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.

Elizabeth M. Matchinski
Administrative Judge