DATE: July 31, 2001

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 01-03111

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR GOVERNMENT

Williams S. Fields, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a scientist who was born in Canada 31 years ago to an American mother who had moved to Canada seeking work during the 1950's. In 1991, he applied for a United States passport in order to attend graduate school in the U.S. He has lived in the U.S. continuously since August 1991, receiving a Ph.D. in mathematics in ay 1996. He considers himself a United States citizen and intends to continue working and living in the United States. Although he has never held a Canadian passport or exercised any rights of citizenship (Canadian) since he began living in the United States in 1991, he has stated he is unwilling to renounce his Canadian citizenship. Clearance is granted.

STATEMENT OF THE CASE

On April 19, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "*Safeguarding Classified Information Within Industry*," dated February 20, 1960, as amended, and modified, and Department of Defense Directive 5220.6, "*Defense Industrial Personnel Security Clearance Review Program*" (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary finding under the Directive that it is clearly consistent with the national interest to grant Applicant's security clearance and recommended referral to an Administrative Judge to determine whether he should be granted a security clearance.

Applicant answered the SOR in writing on May 16, 2001, and stated he wanted his case decided without a hearing. Applicant received his File of Relevant Material (FORM) consisting of seven items on June 4, 2001. He filed his response on June 19, 2001. The case was assigned to Administrative Judge Braeman on July 12, 2001, and reassigned to the undersigned Administrative Judge on July 17, 2001.

FINDINGS OF FACT

The Statement of Reasons (SOR) alleges Applicant indicated a preference for Canada over the United States because he has exercised dual citizenship, has refused to renounce his Canadian citizenship, has traveled to Canada nine times

between August 1991 and August 2000, has failed to register with the selective service system on his 18th birthday, did not forfeit his Canadian driver's license until August 1996, owns a mutual fund and other assets deposited in a Canadian bank and voted in a Canadian election in 1987 or 1988. The SOR further alleges Applicant is subject to foreign influence because his mother is a United States citizen living in Canada and his father and brother are Canadian citizens living in Canada. The SOR was sent to Applicant along with a transmittal letter, a copy of DoD Directive 5220.6, a Privacy Act Notification, and an ASD Memorandum[(1)] dated August 16, 2000.

In his answer to the SOR, Applicant admitted with explanation and clarification all allegations set forth in the SOR. I accept Applicant's admissions, and after a complete and thorough review of the evidence of record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant was born in Canada 31 years ago to a mother who was a United States citizen and a German father--who would later become a Canadian citizen. Applicant's mother moved to Canada to find work during the 1950's; she married Applicant's father and continues to live in Canada although she has never renounced her U.S. citizenship. Applicant's mother was a musician, and his father was a bricklayer; his parents are now retired and continue to reside in Canada. He has one brother who lives in Canada; this brother is an electrical engineer and is currently self-employed as a computer technician/consultant.

Applicant lived in Canada, attended primary school, secondary school and college in Canada, and voted in one Canadian election when he was 18. In 1990, he applied for a U.S. passport in order to attend graduate school in the United States. From August 1991 to May 1996, he attended University A, receiving his Ph.D. in mathematics from this institution in May 1996. He arrived in the U.S. with a Canadian driver's license and did not apply for a local driver's licence because he did not have a car; he walked or took public transportation while he was attending University A. In August 1996, Applicant relocated to another state to teach mathematics at University B. He forfeited his Canadian driver's license and applied for a local driver's license--which he retains. Applicant continued to teach mathematics at University B until June 1998. Since August 1998, he has been employed by the DoD contractor who is his current employer.

Applicant was living in Canada and did not register with the United States Selective Service when he turned 18 in 1987. Nor did he register with the Selective Service during the first four years he resided in the U.S.; he was not required to register after he turned age 25 in 1994. He attributes this failure to register to the erroneous advice he received from friends about the requirement to do so.

Although Applicant considers himself to be a United States citizen and is adamant in stating that his principal loyalty is to the United States, he maintains financial interests[(2)] in Canada and refuses to renounce his Canadian citizenship. He continued to maintain a portion of these interests in the Canadian bank because they were long-term certificates of deposit for which he would have incurred a substantial penalty if he had withdrawn them before a specified date. These certificates have matured in the past five years and he has begun withdrawing the money. Because his parents abused him physically and mentally when he was a child and have always demonstrated greater interest and affection toward his brother than toward him, he does not have close emotional ties to his parents and brother. There is no allegation or evidence Applicant currently holds or has previously held a Canadian passport. He indicated to the Defense Security Service (DSS) during an August 2000 interview he intended to renew his United States passport when it expired later that year. His love interest and cohabitant for the past three years is a graduate student who is a United States citizen.

Two of Applicant's current supervisors have written letters on his behalf. They describe him as an "outstanding scientist" and a young man of the "highest character and morals." He had received above average raises and an early promotion. He is considered to have a "very bright" future with his current employer.

POLICIES

The Adjudicative Guidelines of the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case by case basis with an eye toward making decisions with reasonable consistency which are clearly consistent with the interests of national security. In making these overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and

unfavorable, not only with respect to the relevant Adjudicative Guidelines, but also in the context of the factors set forth in Section 6.3 of the Directive. In that vein, the Government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to Applicant's lack of security worthiness.

FOREIGN PREFERENCE

(Guideline C)

The Concern: When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

Conditions that could raise a security concern and may be disqualifying include:

E2.A3.1.2.4. Accepting educational, medical, or other benefits, such as retirement and social welfare, from a foreign country;

E2.A3.1.2.8 Voting in foreign elections;

Conditions that could mitigate security concerns include:

E2.A3.1.3.1. Dual citizenship is based solely on parents' citizenship or birth in a foreign country;

E2.A3.1.3.2. Indicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship.

FOREIGN INFLUENCE

(Guideline B)

The Concern: A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contracts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

Conditions that could raise a security concern and may be disqualifying include:

E2.A2.1.2.1. An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country.

Conditions that could mitigate security concerns include:

E2.A2.A.3.1. A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitants, or associate (s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States.

E2.A2.1.3.5. Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities.

Burden of Proof

The Government has the burden of proving any controverted facts alleged in the Statement of Reasons. If the Government establishes its case, the burden of persuasion shifts to Applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an Appellant's judgement, reliability, or trustworthiness, Applicant has a heavy burden of persuasion to demonstrate he his nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518 (1988), "the clearly consistent standard indicates security clearance determinations should err, if they must on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against an Applicant.

CONCLUSION

Having considered the record evidence in accordance with the appropriate legal precepts and guidelines, this Administrative Judge concludes the Government has established its case with regard to Guidelines B and C. In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section 6.3, as well as those referred to in the section dealing with Adjudication Process, both in the Directive.

A security concern is raised by Applicant's retaining his Canadian citizenship after arriving in the United States for graduate school ten years ago. He was born in Canada, attended primary school, secondary school and college in Canada, voted in a Canadian election in either 1987 or 1988, lived in Canada until 1991, and returned to Canada for visits nine times since moving to the United States in 1991. Additional indicia of foreign preference alleged in the SOR and admitted to by Applicant are his retention of his Canadian driver's license until 1996, his holding financial interests in a Canadian bank, and his failure to register with the U.S. Selective Service System when he turned 18 in 1987. While there is no evidence he has ever held a Canadian passport or exercised any rights of Canadian citizenship since taking up residence in the United States in 1991, he has admitted exercising dual citizenship (as alleged in the SOR) and has indicated he is unwilling to renounce his Canadian citizenship. 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 interest of the United States.

The security concern suggested by Applicant's multiple Canadian connections is found to be mitigated by Applicant's professed allegiance to the United States and to his employer, and by actions and behavior which are consistent with and supportive of that allegiance. He has lived in the United States continuously for the past ten years; he earned an advanced degree at one American university in 1996, he has taught mathematics at another American university for the next two years, and he has worked for an American company for the past three years. His most significant educational accomplishment was at an American university and his only professional experience are with an American university and with an American company. He has never worked professionally in Canada, has no recent ties with a Canadian educational institution, and no professional experience with a Canadian company.

Applicant has provided a satisfactory and persuasive explanation for retaining his Canadian driver's license until 1996. He did not need a driver's license during the first five years he lived in the United States because he did not have a car. While he may be criticized for his lack of diligence in ascertaining his responsibility under U.S. Selective Service law, there is no evidence he purposefully and intentionally avoided his legal responsibility. He was living in Canada--and would continue to live in Canada--for four years after he turned 18 and the registration requirement initially arose. It is unlikely he was confronted (in Canada) with reminders of this obligation by his parents, the local media or by the actions of his peers. When he arrived in the United States in 1991, there was no draft, and his failure to register cannot be interpreted as an effort to avoid his responsibility as a citizen. He accepted the word of his colleagues--who were presumably intelligent, mature, graduate students--that registering with the Selective Service was not required. While his failure to inquire further may demonstrate a lack of diligence, it does not indicate he preferred Canada to the United States.

Denying Applicant's access to classified information because he has stated an unwillingness to renounce his Canadian citizenship exalts form over substance. There is no clear requirement in the Directive an applicant for a security clearance must renounce his foreign citizenship in order to be granted a clearance; an applicant's expressed willingness to renounce his/her foreign citizenship is a mitigating condition in a case where there is some evidence of foreign preference. This "mitigating condition" may be a necessary and appropriate "requirement" where an applicant has recently, actively and regularly exercised his foreign citizenship rights. However, where, as in this case, Applicant has not exercised his rights as a Canadian citizen for more than ten years, an emphasis on his unwillingness to renounce his

foreign citizenship seems to be somewhat misplaced. Applicant should not be unduly penalized for stating honestly he wants to retain what is apparently, a mere sentimental connection with the country of his birth, the country where his parents and brother currently reside, and the country where he spent the first 21 years of his life. Applicant's motives and honesty would and should be suspect if he would have no qualms about severing his ties with a country whose customs, traditions and democratic government are similar to those of the United States, especially when that country's interests are not in conflict with the United States, and there is no clear requirement for him to renounce his foreign citizenship. What should be important in deciding his suitability to access United States classified material, is not that he wants to retain this sentimental connection to Canada, but that he has done nothing overt to exercise his Canadian citizenship in the past ten years, and there is no indication he intends to exercise his Canadian citizenship in some overt manner in the foreseeable future. His expressed desire to retain this connection is a demonstration of his honesty, rather than a manifestation of foreign preference over the United States. Guideline C is concluded for Applicant.

An additional security concern is raised by evidence Applicant's father and brother are Canadian citizens and reside in Canada, and by evidence his mother resides in Canada. Also raising a security concern are the financial assets Applicant has retained in a Canadian financial institution. A security risk may exist when an individual's immediate family including cohabitants, and other person to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

The security concern raised by Applicant's parents and brother residing in Canada has been quieted by information Applicant has provided concerning their past and current occupations. Neither his parents nor his brother are currently employed by the Canadian Government. And there is no evidence they have been employed by the Canadian Government at any time in the past. Applicant has provided a persuasive explanation for leaving his financial interests in a Canadian bank until recently; he did not want to forfeit a portion of these holdings by withdrawing them early. Now that the forfeiture period has passed, he has withdrawn most of his assets from the Canadian bank and transferred them to the United States. He has indicated he intends to complete this transfer sometime during 2001. Guideline B is concluded for Applicant.

FORMAL FINDINGS

Formal findings as required by Section 3, paragraph 7, of enclosure 1 of the Directive, are hereby rendered as follows:

Paragraph 1 (Guideline C) AGAINST THE APPLICANT

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. For the Applicant

Subparagraph 1.c. For the Applicant

Subparagraph 1.d. For the Applicant

Subparagraph 1.e. For the Applicant

Subparagraph 1.f. For the Applicant

Subparagraph 1.g. For the Applicant

Paragraph 2 (Guideline B) FOR THE APPLICANT

Subparagraph 2.a. For the Applicant

Subparagraph 2.b. For the Applicant

DECISION

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

John R. Erck

Administrative Judge

1.

2. The exact or approximate amount of Applicant's financial interests held on deposit in a Canadian bank is in dispute; the SOR alleges the amount at $64,000.00. In his answer to the SOR. Applicant indicates this amount has been reduced to approximately $16,000.00. Neither the allegation or Applicant's response indicates whether this amount is in Canadian or United States dollars.