DATE: July 27, 2005

In Re:

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

Applicant for Security Clearance

CR Case No. 02-00713

DECISION OF ADMINISTRATIVE JUDGE

JOSEPH TESTAN

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Given the unique set of facts present in this case, and applying the whole person concept, applicant's significant ties to Canada do not pose an unacceptable security risk. Clearance is granted.

STATEMENT OF THE CASE

On November 18, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, (as administratively reissued on April 20, 1999), issued a Statement of Reasons (SOR) to applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant responded to the SOR in writing on December 10, 2004. The case was assigned to the undersigned on March 10, 2005. A Notice of Hearing was issued on February 22, 2005, and the hearing was held on March 22, 2005. The transcript was received on April 4, 2005.

FINDINGS OF FACT

Applicant is a 61 year old married man who has spent over 40 years working with the United States military. He is currently President and part owner of two separate but related companies, one based in the United States and the other in Canada.

Applicant was born and raised in the United States. In the 1970s, he left his employment with a defense contractor to start his own company after he could not get his employer interested in funding his research. His company was not very successful because it didn't generate the income needed to develop the "breakthrough product." In the 1980s, he heard about and investigated a Canadian program that offered aid to entrepreneurs - such as grants, tax credits and subsidies -

if they were willing to start a Canadian business. Canada was not really interested in any particular type of business. They were simply interested in helping a new business get started, which would employ Canadians.

In 1983, applicant moved to Canada and started his Canadian company. Eventually he applied for and achieved the status of a permanent resident in Canada. To maintain his newly acquired permanent residency, he had to live in Canada at least 183 days per year. Since his customers were in the United States, applicant obviously spent a lot of time in the United States meeting with them. This was a burden because of Canada's 183 day residency requirement. In 1990, there was a change in the law which allowed applicant to become a Canadian citizen. He took advantage of the law and became a dual citizen.[(1)] By doing so, he relieved himself of the Canadian residency obligation, and could therefore spend as much time as he wanted in the United States.

Since 2000, applicant has resided in the United States. He has a United States drivers license and no Canadian drivers license. He has not filed a Canadian tax return since 2000, which was the last year he resided there for part of a year. In the past he received medical benefits from Canada, but has not done so since 2001. He does not possess a Canadian health card.

At the present time, each of applicant's companies is worth millions of dollars, The Canadian company employs eight or nine people, and the United States company employs 20 to 25 people. Applicant is the majority owner of the United States company. The Canadian company is now majority owned by applicant's wife (also a dual citizen) for tax purposes.

The evidence clearly establishes that the United States defense effort has greatly benefited, and continues to greatly benefit, from applicant's expertise, as well as from the products applicant's companies produce. All of applicant's classified work is performed at his United States company and remains in the United States. It is not shared with his Canadian company. With respect to the unclassified work performed by his two companies, the evidence establishes that applicant applied for and received permission from DoD to share non-classified technical data and information developed in the United States with his Canadian company (Exhibit G).

In a signed, sworn statement he gave to the Defense Security Service (DSS) in 2001 (Exhibit 2), applicant stated he "would be willing, if called, to comply with an obligation to serve or bear arms on behalf of Canada." In response to SOR Allegation 1h, he denied that he would bear arms for Canada, explaining that his age and health status would render such a situation "hypothetical in the extreme."

On the question of loyalty, applicant emphasized that he did not seek Canadian citizenship at a time when it would have required him to relinquish his United States citizenship. He did so only after the law changed to allow him to retain his United States citizenship. He testified credibly that if the law changed again, and he had to give up one of his citizenships, he would give up his Canadian citizenship. He is not sure if he will live in the United States or Canada when he retires.

CONCLUSIONS

With respect to Guideline C, the evidence establishes that applicant is currently a citizen of both Canada and the United States, he formerly possessed and used a Canadian passport, he has indicated a willingness to bear arms for Canada, he has accepted benefits from Canada, he has resided in Canada to meet residency requirements, and he has used his Canadian citizenship to protect his business interests. These facts require applicant of Disqualifying Conditions E2. A3.1.2.1 *(the exercise of dual citizenship),* E2.A3.1.2.2 *(possession and/or use of a foreign passport),* and E2.A3.1.2.3 *(military service or a willingness to bear arms for a foreign country)*, E2.A3.1.2.4 *(accepting benefits from a foreign country)*, E2.A3.1.2.5 *(residence in a foreign country to meet citizenship requirements)*, and E2.A3.1.2.6 *(using foreign citizenship to protect business interests)*.

The evidence further establishes that when applicant was unable to acquire the financial backing in the United States to pursue his research, he took advantage of a Canadian government program which provided financial assistance to entrepreneurs starting businesses in Canada. By doing so, he was able to launch two successful companies, one in Canada and the other in the United States. This arrangement, which on the surface raises security issues, has been a

great benefit to the United States defense effort during the past two decades.

Applicant has been careful to separate his classified work from his unclassified work. All of the classified work is performed in the United States and remains in the United States. The unclassified work is performed at both companies, and with the express permission of DoD, is shared by the two companies. This fact, together with the fact that DoD has dealt with applicant - indeed has sought him out - while aware of his business structure leads me to conclude that the United States has sanctioned applicant's activity. He therefore qualifies for Mitigating Condition E2.A3.1.3.3 *(activity is sanctioned by the United States)*.

The only fact that would automatically bar applicant from access to classified information would be his current use or possession of a foreign passport. Applicant has dealt with this issue by surrendering his Canadian passport to Canadian authorities.

With respect to Guideline L, applicant is a representative of his Canadian company, and he is engaged in the analysis and discussion of defense/intelligence material. Accordingly, Disqualifying Conditions E2.A12.1.2.3 *(a representative of a foreign interest)* and E2.A12.1.2.4 *(a person engaged in analysis, discussion . . .of material on intelligence, defense . . .)* are applicable. Based on applicant's clear separation of his classified and unclassified work, and the permission he received from DoD to share his unclassified work with the Canadian company, I conclude he qualifies for Mitigating Condition E2.A12.1.3.1 *(evaluation of the outside employment or activity indicates it does not pose a conflict with an individual's security responsibilities)*.

Given the unique set of facts this case presents, and the fact that the foreign power at issue is Canada, common sense requires that applicant be allowed continued access to classified information.

FORMAL FINDINGS

GUIDELINE C: FOR THE APPLICANT

GUIDELINE L: 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 or continue a security clearance for applicant.

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Joseph Testan

Administrative Judge

1. Shortly after he became a Canadian citizen, applicant obtained a Canadian passport. When he learned that possession of this passport would preclude him from holding a security clearance, he surrendered it to Canadian authorities (TR at 36-37).