DATE: September 25, 2003

In re:

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

Applicant for Security Clearance

ISCR Case No. 02-13897

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Juan Rivera, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a naturalized citizen of the US who is a citizen of Canada solely by virtue of his birth to French-Canadian parents, and who has not actively pursued his dual citizenship with Canada since becoming a US citizen, extenuates and mitigates security concerns associated with his accrued Canadian pension by virtue of a 1981 agreement between the US and Canada that creates reciprocal enforcement of pensions rights of citizens of the two countries. Applicant has no other rights, privileges or benefits by virtue of his dual US-Canadian citizenship and maintains his undivided loyalties to the US. Clearance is granted.

STATEMENT OF THE CASE

On April 9, 2003, 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, 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 granted, continued, denied or revoked.

Applicant responded to the SOR on April 18, 2003, and requested a hearing. The case was assigned to this Administrative Judge on June 10, 2003, and was scheduled for hearing. A hearing was convened on July 15, 2003, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny or revoke Applicant's security clearance. At hearing, the Government's case consisted of three exhibits; Applicant relied on one witness (himself) and six exhibits, in addition to a 1981 agreement between the US and Canada, which official notice was taken. The transcript (R.T.) of the proceedings was received on July 23, 2003.

PROCEDURAL ISSUES

During the hearing, Applicant requested official notice be taken of a certain US-Canada agreement, executed in 1981

that recognizes and combines pension rights earned in the respective countries and provides reciprocal enforcement machinery to ensure payment entitlements on both sides of the border (*see* ex. US-Canadian Agreement of 1981). There being no objection from Department Counsel, and good cause being shown, official notice was taken of the US-Canada agreement, executed in 1981, pursuant to Rule 201 (b) of the Federal Rules of Evidence.

Prior to the close of the evidence, Applicant asked for leave to supplement the record with documentation of his application for renunciation of his Canadian citizenship. For good cause shown, Applicant was afforded ten (10) days to supplement the record with documentation of his application for renunciation of his Canadian citizenship. Government, in turn, was granted three (3) days to respond. Within the time permitted, Applicant provided a statement confirming his intention to continue holding his Canadian citizenship, along with a copy of his unsuccessful attempts to register with the US Selective Service on-line. Department Counsel interposed no objections or comments re: Applicant's post-hearing submission, but stood on the evidence presented and the arguments set forth during the heaering. Applicant's statement and documented on-line attempt to register with the US Selective Service are admitted as Applicant's exhibit F.

STATEMENT OF FACTS

Applicant is a 53-year old network engineer for a defense contractor who seeks a security clearance.

Summary of Allegations and Responses

Under Guideline C, Applicant is alleged to (a) be a dual citizen of Canada and the United States and (b) have a Canadian pension that accrued over 21 years he worked in Canada, as a result of which he would be not willing to relinquish his Canadian citizenship, if doing so would cause him to lose his Canadian pension.

For his response to the SOR, Applicant admitted his alleged dual citizenship with Canada and the US and accrued Canadian pension, but denied any unwillingness his renounce his Canadian citizenship if it is required for his job.

Relevant and Material Findings

The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

Applicant was born in Morocco (his father a French citizen) in 1950 and spent his early childhood years there. After leaving Morocco in 1956 with his family, he spent several months in France before immigrating to Canada in February 1957, where his parents became naturalized Canadian citizens. Applicant continued to reside in Canada to 1972, when he first traveled to the US and met his first spouse: an American citizen. He and his first spouse soon returned to Canada, where he continued to work and reside for the ensuing twenty years. His first wife bore him two sons: one has served in the US Navy, while the other was refused.

With his first wife (W1) acting as his sponsor, Applicant and W1 moved to the US in 1991, mainly to escape the cold Canadian winters. Soon thereafter, he divorced her. He married his second wife (W2) in 1992. Never having served in the Canadian military, Applicant was eligible to register with the US Selective Service upon his arrival in the US. However, no one advised him of his need to register with the US Selective Service, and Applicant did not register. He has always been willing to take up arms for the US and attempted recently to do so on-line, but was unsuccessful. In his latest attempt to register with the Selective Service, he was turned away as too old to serve (*see* ex. B).

Upon his arrival in the US in 1991, Applicant applied for US citizenship. He was naturalized in 1996. In return for his being given a US passport, he relinquished his Canadian passport. When he travels, he always uses his US passport. If asked, he would willingly bear arms for the US. W2 has also applied for US citizenship. Her citizenship application is still pending.

Applicant has two parents living in Canada. Should both die, he stands to inherit modest property from them. He has earned two Canadian pensions as the result of his years of work in Canada: one from the federal government and one from the Quebec provincial government. Out of concern he might lose one or both of these pensions should he renounce

his Canadian citizenship, he advised the DSS interviewer in his March 2002 interview that he was against relinquishing his Canadian citizenship. Since then, he has learned of a US-Canada agreement (executed in 1981) that recognizes and combines pension rights earned in the respective countries and provides reciprocal enforcement machinery to ensure payment entitlements on both sides of the border (*see* ex. US-Canadian Agreement of 1981). For so long as the US-Canada pension agreement (which became effective in 1984) remains in force, he does not concern himself with Canadian citizenship retention to ensure vesting of his pension benefits (*see* R.T., at 32-33). By virtue of this agreement, Applicant's Canadian pension rights are counted as a part of his earned social security rights under the US's social security system. To be eligible to collect these earned Canadian pension benefits, Applicant need not be a Canadian citizen (*see* US-Canada agreement; R.T., at 35-36).

Applicant is committed to staying and working in the US, and to the best of his knowledge is not entitled to any other Canadian rights, privileges or benefits (such as medical or education). He has no bank accounts, real estate, stocks or other assets in Canada, and has no financial obligations outside of the US (*see* ex. 3). He has not voted in Canada since immigrating to the US; nor has he sought political office in Canada. Applicant has never served or registered with the Canadian military and has no desire or intention to comply with any obligation to serve or bear arms in behalf of a foreign state (Canada included). By contrast, he and W2 own their home in the US. Additionally, Applicant has a 401(k) established through his current employer (*see* R.T., at 31).

Applicant joined his current employer in March 1998, following a previous employment with another American company. For his contributions to his current employer, he has been richly commended and awarded certificates of appreciation (*see* ex. A).

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) lists "binding" policy considerations to be made by judges in the decision making process covering DOHA cases. The term "binding," as interpreted by the DOHA Appeal Board, requires the Judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E2.2 of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Foreign Preference

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.

Disqualifying Conditions:

DC 1. The exercise of dual citizenship

DC 4. Accepting educational, medical, or other benefits, such as retirement and social welfare, from a foreign country.

DC 6. Using foreign citizenship to protect financial or business interests in another country.

Mitigating Conditions:

MC 1 Dual citizenship is based solely on parents' citizenship or birth in a foreign country.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires DOHA administrative judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing

on the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of accessible risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation.

CONCLUSIONS

Applicant comes to these proceedings as an emigre from Canada who became a naturalized citizen of the US in 1996 and has never exercised any active indicia of dual citizenship with Canada since his becoming a US citizen. Claiming his principal affections lie with the US, he, nonetheless, retains pension rights in Canada as the result of his years of employment there.

Dual citizenship concerns necessarily entail allegiance assessments and invite critical considerations over acts indicating a preference or not for the interests of the foreign country over the interests of the US. The issues, as such, raise concerns over Applicant's preference for a foreign country over the US.

By virtue of his birth in Morocco to parents of Canadian descent and citizenship, Applicant was endowed with Canadian citizenship through his parents. This citizenship could not be lost except by express renunciation of the holder. This, Applicant has never done. Since becoming a naturalized US citizen in 1996 Applicant has taken no actions and exercised no Canadian privileges that can be fairly characterized as active indicia of dual citizenship. He has not registered or served in the Canadian military or voted in Canadian elections since moving to the US in 1991. He holds no property or financial interests in Canada and has accepted no educational, medical or other benefits from Canada since becoming a US citizen (save for his earned pensions). Nor has he ever performed or attempted to perform duties, or otherwise acted so as to serve the interests of Canada in preference to the interests of the US since becoming a US citizen.

Because Applicant retains earned pension rights in Canada as the result of retirement benefits accrued to him through years of employment in that country, disqualifying conditions (DC) 4 (accepting educational, medical or other benefits, such as retirement benefits) and 5 (using foreign citizenship to protect financial or business interests) of the Adjudicative Guidelines for foreign preference have some applicability to the facts of Applicant's case. However, any reliance on his Canadian citizenship that might have been imputed to Applicant to protect his Canadian pension is neutralized for the most part by virtue of the US-Canada agreement of 1981 that recognizes and combines pension rights between the two countries: incorporating his Canadian pension rights, as such, with those pension rights he should earn under the US social security system. As a result of the agreement, Applicant is no longer dependent on his continued Canadian citizenship to vest his pension.

Although Applicant no longer relies on his Canadian citizenship to ensure the vesting of his pension from the fruits of his labors in that country, he continues disavow any intentions to renounce his Canadian citizenship: now due to his concerns about bureaucratic barriers to his taking leaves of absence to spend extended periods of time in Canada, should they become necessary to care for his aging parents. None of these reasons for maintaining Canadian citizenship reflect

concerns about financial or business interests in Canada and draw no specific coverage of any of the disqualifying conditions of Guideline C of the Adjudicative Guidelines. While his refusal to relinquish his Canadian citizenship might preclude him from taking advantage of MC 4 (expressed willingness to renounce his citizenship), his refusal to renounce cannot be used as a sword either to compound security concerns over his holding dual citizenship with Canada or to provide any additional basis for disqualification. Maintenance of passive dual citizenship is not an independent grounds for clearance denial under the Directive.

Failure to satisfy a mitigating condition may be taken into account when assessing an applicant's overall claim of extenuation, mitigation, or changed circumstances, but may not be turned into a disqualifying condition. *See* ISCR Case No. 01-02270 (August 29, 2003). That Applicant may wish to keep his Canadian citizenship out of concern for minimizing impediments to securing extended stays in Canada to care for his parents (should they require attention in the future) is not sufficient reason to preclude him from mitigating security concerns over his holding Canadian pension rights, if those rights do not entail his exacting preferential retirement privileges from Canada.

Overall, Applicant persuades that his preference is with the US. He satisfies his burden threshold in several ways: demonstrated lack of any prior exercise of any privileges associated with his Canadian citizenship and demonstrated firm support of the US and its institutions since becoming a naturalized US citizen. Applicable mitigating conditions entail: MC 1 (dual citizenship based solely on parent's citizenship). Credited with being a dedicated and trustworthy defense contractor employee, he absolves himself of foreign preference concerns and carries his evidentiary burden on the presented issue of whether his preference lies with his native country (Canada) or his adopted country (US). Favorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a and 1.b of Guideline C.

In reaching my decision, I have considered the evidence as a whole, including each of the factors and conditions enumerated in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR in the context of the FINDINGS OF FACT, CONCLUSIONS and the Adjudicative Guidelines listed above, I make the following separate FORMAL FINDINGS with respect to Applicant's eligibility for a security clearance.

CRITERION C (FOREIGN PREFERENCE): FOR APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR 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 Applicant's security clearance.

Roger C. Wesley

Administrative Judge