KEYWORD: Foreign Preference

DIGEST: Applicant is a naturalized citizen of the U.S. and a citizen of Canada solely by virtue of her birth to American-Canadian parents. She has not actively pursued her dual citizenship with Canada since becoming a U.S. citizen, save for her limited use of her Canadian passport before turning it in to the Canadian consulate. She extenuates and mitigates security concerns associated with her past possession and use of her Canadian passport and accrued Canadian pension by virtue of her returning her passport and demonstrating her principal assets to be U.S. based. Besides her Canadian pension and a small Canadian checking account, Applicant has no other material rights, privileges or benefits by virtue of her dual U.S.-Canadian citizenship and maintains her undivided loyalties to the U.S. Clearance is granted.

CASENO: 04-11510.h1

DATE: 01/31/2006

DATE: January 31, 2006

In re:

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

Applicant for Security Clearance

ISCR Case No. 04-11510

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Department Counsel

FOR APPLICANT

Chester H. Morgan, II, Esq.

SYNOPSIS

Applicant is a naturalized citizen of the U.S. and a citizen of Canada solely by virtue of her birth to American-Canadian parents. She has not actively pursued her dual citizenship with Canada since becoming a U.S. citizen, save for her limited use of her Canadian passport before turning it in to the Canadian consulate. She extenuates and mitigates security concerns associated with her past possession and use of her Canadian passport and accrued Canadian pension by virtue of her returning her passport and demonstrating her principal assets to be U.S. based. Besides her Canadian pension and a small Canadian checking account, Applicant has no other material rights, privileges or benefits by virtue of her dual U.S.-Canadian citizenship and maintains her undivided loyalties to the U.S. Clearance is granted.

STATEMENT OF THE CASE

On August 3, 2005, 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 September 12, 2005, and requested a hearing. The case was previously assigned to another Administrative Judge before being reassigned to me on November 3, 2005 for hearing. A hearing was scheduled for November 16, 2005, and convened on November 16, 2005, 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 five exhibits; Applicant relied on two witnesses (including herself and 11 exhibits), The transcript (R.T.) of the proceedings was received on December 5, 2005.

PROCEDURAL ISSUES

Before the close of the evidence, Department Counsel moved to amend the SOR to delete part of subparagraph 1.c, *i.e.,* the phrase "and a Canadian Old Age Pension after you reach the age 65." There being no objection from Applicant, and good cause being shown, Department Counsel's proposed amendment was approved.

Prior to the close of the record, Applicant submitted a character reference from the director of the DoD training and exercise center with whom she inter faces on a regular basis. Department Counsel objected to the admission of this character reference on the grounds it was untimely and deprived the Government of the opportunity to cross-examine Applicant on the document. Character references have historically never been excluded for the lack of availability of the declarant to be cross-examined, and do not preclude Department Counsel from commenting on the merits of the submission. For good cause shown, Applicant's submission is admitted as exhibit M.

SUMMARY OF ALLEGATIONS AND RESPONSE

Under Guideline C, Applicant is alleged to (a) be a dual citizen of Canada and the United States, (b) possess a Canadian passport issued in August 2002 that will not expire until August 2007, (c) be entitled to receive a Canadian pension and a Canadian old age pension after 65, (d) maintain a checking account with a Canadian bank with a balance of $1,500.00 and (e) maintain a registered retirement savings plan in Canada.

For his response to the SOR, Applicant admitted each of the allegations with explanations. She claimed to have been a naturalized U.S. citizen in July 1978 based on her mother's U.S. citizenship. She claimed to have had a Canadian passport since 1983, and renewed it every five years, and used it exclusively to travel back and forth to Canada for safety reasons.

FACTUAL FINDINGS

Applicant is a 46-year old software developer for a defense contractor who seeks a security clearance. 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 Canada and attended highs school there. Following her college graduation, she spent two years with the Canadian defense department. She returned to college in 1984 to pursue a masters curriculum and received her master's degree in engineering in 1985.

Applicant joined NORAD in 1987, where she has held a security clearance through Canada. Because of a U.S.-Canada agreement, she was permitted to access classified U.S. documents (*see* ex. 2; R.T., at 44). Still a Canadian citizen, she accepted a position with a U.S. contractor in 1992 and applied for a special clearance. As a part of her clearance process, she was required to express her intent to become a U.S. citizen, which she did and was granted her clearance the same year (R.T., at 47). She has continued to hold her clearance without any interruptions since 1992.

Shortly after applying for her U.S. clearance application in 1992, Applicant applied for U.S. citizenship and became a naturalized U.S. citizen in 1996 (R.T., at 47). Since becoming a U.S. citizen, Applicant has maintained close contact with her parents who still reside in Canada. Her father is 82 years old and in poor health; he requires multiple medications. Her mother (a U.S. citizen by birth) is 75 years old and in good health. Applicant has two siblings: a brother who is married and lives in Canada and a sister who resides in the U.S. and has an application pending for U.S. citizenship (*see* ex. 3; R.T., at 49-51). Applicant herself is unmarried and has no children.

When Applicant became a naturalized U.S. citizen in 1996, she did not have a U.S. passport. After obtaining a U.S. passport, she regularly carried both her Canadian and U.S. passports with her when traveling to Canada and back (R.T., at 51-52). Unaware that possessing a foreign passport created adverse security implications, she renewed her Canadian passport every five years since 1983. The last Canadian passport she renewed (in August 2002) was scheduled to expire in August 2007.

When traveling to Canada, typically Applicant would show her U.S. passport and hold her Canadian passport in hand just in case she needed it. She found this practice to be more convenient in dealing with French Canadian police when entering Canada (R.T., at 71-73). Applicant did use her Canadian passport on one occasion in July 2003 to enter Canada (*see* ex. 5). When she returned from her trips to Canada, she regularly reported her travel to her facility clearance officer (FSO).

Since 1996, Applicant's foreign trips have been mainly limited to trips back and forth to Canada to see her family. She did make one trip to Saudi Arabia in 1999 on official U.S. contractor business and carried her U.S. passport. She became aware of the Money memo bar on possessing a foreign passport only this year. Her FSO explained the passport bar as a security measure designed to monitor the travel of persons with security clearances (R.T., at 54). Once informed, Applicant made immediate arrangements with the Canadian consulate to return her Canadian passport (*see* ex. K; R.T., at 55).

Applicant has two Canadian pensions. One is like an American 401(k), but is managed directly by the Canadian

Government. In Canada, she was required to make contributions to her pension while she was working for Canadian source employers (*see* ex. 6) and contributed to the fund through payroll deductions between 1976 and 1992.

Since 2002, she has not made any further contributions to her pension fund, which in 1992 was valued at $40,000.00 (*see* ex. 2) and is currently valued at only $17,000.00 (R.T., at 76). While she cannot currently withdraw the funds, she can apply for the funds once she reaches the age of 60. However, she will be subject to a penalty for early withdrawal before age 65 (R.T., at 56-57, 60-61) Out of concern for invoking a 25 per cent penalty, Applicant has not transferred her vested Canadian pension to a U.S. IRA-type account (R.T., at 74-76).

Applicant has a separate Canadian old age pension (*see* ex. L). Because of an international agreement between the U.S. and Canada, Canadian pensioners like Applicant who reside in the U.S. may contribute to their Canadian pension funds to aggregate credits, and visa versa (*see* ex. F). Since Applicant has already satisfied the minimum 40 quarters required to vest her pension, it is not necessary to avail herself of the agreement's reciprocity provisions. To fully vest her Canadian old age pension rights, though, she would need to accumulate 20 years of working residency in Canada. Applicant only has 14 years of residency and is not pension-eligible to receive an old age pension from Canada once she reaches the age of 65 (R.T., at 58-59). And because she hasn't made any contributions to the pension fund since 1992, her pension contributions will continue to decrease until she reaches the age of 65 (R.T., at 77-78).

Because of the U.S.-Canada social security agreement in force, Applicant may still qualify for an old age pension by aggregating periods of contribution to the pension program in the U.S. after the age of 18. At 65, she could be eligible to receive her Canadian old age pension based on aggregated contributions in Canada and the U.S. Should she elect to take her Canadian pension, though, she would not be eligible to receive U.S. social security under the terms of the U.S.-Canada reciprocity agreement.

Besides her Canadian pension plan, Applicant maintains a very small checking account in Canada (around $1,500.00) for her minimal use when she travels there to see her parents (R.T., at 59-60). She maintains a much larger checking account in the U.S. She also has a deferred savings plan in Canada, which she has been contributing to since 1992. The fund earns interest and is subject to both account appreciation and depreciation. Applicant is not eligible to make any withdrawals from this plan till she reaches the age of 65. This plan is small compared to her U.S. 401(k) plan that has about $270,000.00 in it at present (R.T., at 76).

Applicant estimates her Canadian assets to be roughly 2.27 per cent of her U.S. asset portfolio. She estimates her total net worth to be approximately $700,000.00 (*see* ex. B; R.T., at 62).

Devoted to defending U.S. security interests, Applicant has served in various professional assignments in the U.S. defense industry. Her only active exercise of Canadian citizenship has been her aforementioned use of her Canadian passport when traveling to and from Canada. Since applying for U.S. citizenship, she has not participated in Canadian

elections (either federal or local), participated in any Canadian socialized programs (like unemployment insurance), nor paid any Canadian taxes (R.T., at 63-64). She has retained her Canadian citizenship only out of respect for her father and concern for his medical state. She remains committed to renouncing her Canadian citizenship, but simply can not do it now, out of fear of hurting him (R.T., at 65).

Applicant is well regarded by colleagues who know her and work with her. Her assistant security officer with her current employer who has interacted with her daily for the past four years describes her as very security conscious (R.T., at 32-34) and worthy of holding a security clearance. When Applicant showed him her Canadian passport during her security clearance process, he advised her she should probably "turn it in." (R.T., at 35). He was not aware of any Applicant security violations during his time with the contractor and knows of no other instances besides her trips to Canada to see her parents where she used her Canadian passport (R.T., at 37).

Applicant is well regarded as well by the director of the DoD training and exercise center that interfaces with her on a regular basis. This director goes so far as to characterize Applicant as an indispensable member of the DoD training and exercise center who possesses years of experience working with sensitive military programs and whose performance is impeccable (*see* ex. M). This DoD program director credits Applicant with playing a critical role in "ensuring the smooth and efficient operation of this team" (ex. M).

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.

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 presents as an emigre from Canada who became a naturalized citizen of the US in 1992 and, except for carrying her Canadian passport with her when entering and exiting Canada, and actually using it on one occasion, to see her parents, has never exercised any active indicia of dual citizenship with Canada since her becoming a U.S. citizen. Claiming her principal affections lie with the U.S., she, nonetheless, retains vested 401(k) type pension rights in Canada as the result of her years of employment there. While she is not eligible to receive a Canadian old age pension, having worked only 14 of the required 20 years in Canada, she may be eligible at age 65 by aggregating her U.S. social security contributions with her Canadian contributions and invoking the mutual enforcement entitlements of the U.S.-Canada social security agreement.

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 U.S. The issues, as such, raise concerns over Applicant's preference for a foreign country over the U.S.

By virtue of her birth in Canada to parents of Canadian and U.S. descent, respectively, 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, out of respect for her father, who remains in poor health. Since becoming a naturalized U.S. citizen in 1992 Applicant has taken no actions and exercised no Canadian privileges that can be fairly characterized as active indicia of dual citizenship, save for her limited use of her Canadian passport when traveling to Canada to see he parents. She has not voted in Canadian elections or served in the Canadian military since moving to the U.S. in 1992. She holds only a small checking account in Canada, which is quite minimal when compared to her U.S. asset portfolio, and has accepted no educational, medical or other benefits from Canada since becoming a U.S. citizen (save for her earned pension). Nor has she 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 U.S. since becoming a U.S. citizen.

Because Applicant used her Canadian passport and retains earned pension rights in Canada as the result of retirement benefits accrued to her through years of employment in that country, 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.A3.1.2.4 (*Accepting educational, medical or other benefits, such as retirement and social welfare, from a foreign country*) and E2.A3.1.2.5 *(Using foreign citizenship to protect financial or business interests in another country*) of the Adjudicative Guidelines for foreign preference have some applicability to the facts of Applicant's case. However, her earned Canadian pension rights are not payable till age 65 and will continue to decrease in amount till she reaches the age of 65 due to her lack of continuous funding of the pension since 1992.

Furthermore, Applicant's financial interest in her tax advantaged future Canadian pension is still quite minimal (around $17,000.00) when compared with her U.S. based portfolio and overall net worth (around $700,000.00) and was vested before she applied for U.S. citizenship. And any reliance on her Canadian citizenship that might have been imputed to Applicant to protect her old age pension is subject to the U.S.-Canada social security mutual enforcement agreement as it relates to old age pension benefits accruing in either country. As a result of this agreement's neutralizing of any country advantage in collecting old age pension benefits derived from either country, Applicant's Canadian old age pension rights became security insignificant and were properly deleted by Department Counsel as a source of security concern at the close of the hearing.

Although Applicant no longer relies on her Canadian citizenship to ensure the vesting of her pension from the fruits of her labors in that country, she remains reluctant to renounce her Canadian citizenship while her father is alive out of fear of hurting him. Her reason for wanting to maintain her Canadian citizenship for the time being does not 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 her current refusal to relinquish her Canadian citizenship might preclude her from taking advantage of E2.A3.1.3.4 *(Individual has expressed willingness to renounce dual citizenship*), her refusal to renounce her Canadian citizenship cannot be used to compound security concerns over her 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.

By relinquishing her Canadian passport, Applicant has complied with the mandatory requirements of the Money memo. And while her turning in her foreign passport does not automatically mitigate any past use of the passport to enter and exit Canada, her recited limited use of the passport when entering Canada to see her parents is insufficient by itself to demonstrate Applicant's preference for Canada over the U.S.

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 her Canadian citizenship out of concern for her father's health is not sufficient reason either to preclude her from mitigating security concerns over her holding Canadian pension rights, if those rights do not entail her exacting preferential retirement privileges from Canada.

Overall, Applicant persuades that her preference is with the U.S. She satisfies her proof burden in several ways: demonstrated lack of any prior exercise of any privileges associated with her Canadian citizenship, save for her limited use of her Canadian passport and maintaining a small bank account in Canada, and demonstrated firm support of the U.S. and its institutions since becoming a naturalized U.S. citizen. Credited with being a dedicated and trustworthy defense contractor employee, she absolves herself of foreign preference concerns and carries her evidentiary burden on the presented issue of whether her preference lies with her native country (Canada) or her adopted country (U.S.). Favorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a through 1.e of Guideline C.

In reaching my decision, I have considered the evidence as a whole, including each of the factors and conditions in E2.2.2 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.

GUIDELINE C (FOREIGN PREFERENCE): FOR APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: FOR APPLICANT

Sub-para. 1.d: FOR APPLICANT

Sub-para. 1.e: 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. Clearance is granted.

Roger C. Wesley

Administrative Judge