DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 09-06084
	)	
Applicant for Security Clearance	)	

Appearances

For Government: David Hayes, Esquire, Department Counsel
For Applicant: *Pro se*

June 14, 2011

Decision

O'BRIEN, Rita C., Administrative Judge*:*

Based on a review of the pleadings, exhibits, and testimony, I conclude that Applicant has mitigated the security concerns raised under the guideline for foreign preference. Accordingly, his request for a security clearance is granted.

Following Applicant's application for a security clearance on October 13, 2008, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding[1] that it is clearly consistent with the national interest to grant his request.

On July 8, 2010, DOHA issued to Applicant a Statement of Reasons (SOR) that specified the basis for its decision: security concerns addressed in the Directive under

[1] Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

Guideline C (Foreign Preference) of the Adjudicative Guidelines (AG).[2] In his notarized Answer of August 5, 2010, Applicant admitted all the allegations in the Statement of Reasons. He also requested a hearing before an administrative judge.

Department Counsel was prepared to proceed on May 12, 2011, and the case was assigned to me on May 20, 2011. DOHA issued a Notice of Video Teleconference Hearing on May 26, 2011, and I convened the hearing as scheduled on June 3, 2011. Department Counsel offered three exhibits, which I admitted as Government Exhibits (GE) 1 through 3. Applicant testified and offered six exhibits, which I admitted as Applicant's Exhibits (AE) A through F. DOHA received the transcript (Tr.) on June 8, 2011.

Procedural Matters

Notice of Applicant's hearing was issued on May 26, 2011, for a hearing held on June 3, 2011. Directive ¶ E3.1.8 requires that applicants receive 15 days notice of a hearing. Applicants can waive that right, if they provide a knowing and intelligent waiver.[3]

Department Counsel contacted Applicant on May 24, 2011 regarding the hearing date. Applicant asked that the hearing be held on June 3 because he had travel arrangements already in place that would interfere with a later date. I granted his request. At the hearing, Applicant stated that he waived his right to 15 days notice of the hearing date. (Tr. 10-11)

Findings of Fact

Applicant's admissions to the SOR allegations are incorporated herein as findings of fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the record evidence, I make the following additional findings of fact.

Applicant, 26 years old, was born in Canada. He married in 2007, and does not have children. He completed a bachelor's degree in Canada in fine arts/film studies in 2006. While in college, Applicant had numerous jobs, including retail sales and teaching. He moved to Germany after graduation in 2006, and worked at a U.S. military base in 2007. In December 2007, he began his current position as a senior multimedia

[2] Adjudication of this case is controlled by the Adjudicative Guidelines. The Adjudicative Guidelines supersede the guidelines listed in Enclosure 2 to the Directive, and they apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

[3] ISCR Case No. 06-24213, (App. Bd., June 10, 2008) at 2.

specialist for a U.S. defense contractor in Germany. He travels to combat and non-combat locations to cover command exercises. He is also self-employed, teaching photography and computer editing classes for the military welfare and recreation community. In April 2011, he was accepted into an online master's degree program at a U.S. university. This is his first application for a security clearance. (GE 1, 2; AE C; Tr. 33-36)

Applicant grew up in Canada. However, his maternal grandmother is a native-born United States citizen. She grew up in the United States and attended school here. She lived in Canada after her marriage. For at least 15 years, she and Applicant's grandfather spent half of each year living in Florida, where she owns property. As a child, Applicant spent his family vacations in Florida from about 1994 to 2004. (GE 1, 2, 3; AE C; Tr. 26, 39-42)

Applicant obtained his U.S. citizenship through his maternal grandmother. He testified that a U.S. federal law[4] at the time allowed Canadians to obtain U.S. citizenship through parents or grandparents who qualified under the law. Applicant's grandmother met the test of physical presence in the United States for at least five years. Applicant took advantage of the opportunity. His mother completed a lengthy process that resulted in Applicant becoming a naturalized U.S. citizen in April 2002, at the age of 17. He received his U.S. passport on January 13, 2003. (GE 1, 2, 3; AE C; Tr. 39-42)

Applicant's expenses at a Canadian college were funded through loans from an American bank, and through a scholarship sponsored by his father's U.S. employer. He had an option to obtain a loan through the Canadian government but chose not to do so. While he was a college student, he received healthcare through the Canadian system in 2004. Canadian residents have no choice other than to use the national system. He has not used the Canadian healthcare system since 2004. Applicant is receiving his graduate education at a U.S. school. He consciously chose a U.S. school, even though he was accepted by British and German schools, because he wished to receive the benefits of a high-quality U.S. graduate education. Since 2006, he has paid for health benefits through his U.S. employer. (GE 1, 2, 3; Tr. 26-27, 50)

Applicant's parents currently live in the Canada; his mother is a dual citizen of the United States and Canada. His maternal grandmother, brother, and uncles live in Canada and are citizens of both countries. His uncle was born in and grew up in the United States. His mother is the finance manager for the police headquarters of a Canadian province. Applicant's brother lives with Applicant in Germany, where he works for a U.S. company. (GE 1; Tr. 41-43)

Applicant's wife is a German citizen. She and Applicant met in Canada while he was attending college. She was taking a year off from college in Germany and working as a nanny for a missionary couple. When they married, Applicant relocated to Germany. They do not have children, but they agree that they both wish their children to

[4] Applicant cited PL 105-38, §322, Immigration and Nationality Act, August 8, 1997.

be native-born U.S. citizens. They plan to live in the United States once they decide to start their family. Applicant no longer intends to retire in Canada, as he mentioned in his security interview. (GE 1, 2; Tr. 31-32, 38, 53)

Applicant obtained a Canadian passport on January 7, 2003, a few days before he received his U.S. passport. He used the Canadian passport to travel to Germany in 2005 and 2006 for his college student exchange program. He had planned to travel on his U.S. passport, but personnel at both schools advised him to use the Canadian passport to simplify the process, as he was traveling from Canada and was a student at a Canadian school. He last used his Canadian passport in July 2006, when he was 19 years old. Since then, he decided to use his U.S. passport exclusively, even though his Canadian passport was still valid, because he had begun working for a U.S. defense contractor. His job involves extensive international travel: he has traveled to foreign countries 40 to 50 times in the past four or five years. He has used only his U.S. passport. In 2006 and 2007, while his Canadian passport was valid, he traveled to Canada using his U.S. passport. His Canadian passport expired on January 7, 2008, and he did not renew it. (GE 1, 2, 3; AE A; Tr**.** 22-24, 56-57)

Applicant surrendered his Canadian passport to his facility security officer (FSO) on March 23, 2011. In an attached cover letter, he stated that he "would like this action to be seen as renunciation of my Canadian citizenship" and that he would no longer exercise the rights of a Canadian citizen. Applicant's FSO confirmed that he witnessed Applicant destroy his Canadian passport, and that he subsequently accepted the invalidated passport from Applicant. Applicant reiterated his renunciation of his foreign citizenship at the hearing. (AE A; Tr. 24-25, 52-53)

As an employee of a U.S. company located in Germany, Applicant is required to hold a German residency permit. He submitted a letter from his human resources department confirming this requirement. Residents who hold such permits are required to pay German taxes. Applicant has not filed Canadian tax returns since 2005. He has filed U.S. income tax returns since 2006. He currently files both U.S. and German income tax returns each year, on both his contractor and self-employment income. He is also required to maintain an account in a German bank, so that his pay can be automatically deposited by his U.S. employer. (AE F; Tr. 37-38, 48-50)

Applicant has a bank account and a student loan from a Canadian bank. He does not own property in Canada or Germany and has no business ties in either country. Applicant last voted in a Canadian election in 2004. He did not vote in federal Canadian elections that were held in 2006, 2007, 2008, or 2011, or a provincial election in 2007. Applicant obtained a U.S. absentee ballot in 2008 so that he could vote in the U.S. presidential election. He also registered with the U.S. Selective Service System. (GE 1, 2; AE B, F; Tr. 25-26, 48-50)

Among the character documents that Applicant provided were performance evaluations from 2008 through 2011. His performance was consistently averaged 8 of

10, with 10 indicating the highest performance level. He received numerous letters of appreciation for his work, including letters from a brigadier general, project manager, project engineer, operations manager, and a global outreach director. They praised Applicant's dedication, natural management skills, and maturity, and lauded him as a cornerstone of the team. A retired Marine sergeant described him as honest and trustworthy. He also received command coins for his exceptional work in overseas duty stations. (AE D, E)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the revised AG.[5] Decisions must also reflect consideration of the "whole person" factors listed in ¶ 2(a) of the Guidelines.

The presence or absence of disqualifying or mitigating conditions does not determine a conclusion for or against an applicant. However, specific applicable guidelines should be followed when a case can be so measured, as they represent policy guidance governing the grant or denial of access to classified information.

A security clearance decision is intended only to resolve the question of whether it is clearly consistent with the national interest[6] for an applicant to receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it falls to applicants to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, applicants bear a heavy burden of persuasion.[7] A person who has access to classified information enters a fiduciary relationship based on trust and confidence. The Government has a compelling interest in ensuring that applicants possess the requisite judgment, reliability, and trustworthiness to protect the national interest as his or his own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of the Government.[8]

---

[5] Directive. 6.3.

[6] *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).

[7] *See Egan,* 484 U.S. at 528, 531.

[8] *See Egan;* Adjudicative Guidelines, ¶ 2(b).

Analysis

Guideline C, Foreign Preference

The security concern involving foreign preference arises

> [W]hen 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. (AG ¶ 9)

Under AG ¶ 10 of the Directive, the following disqualifying condition is relevant:

> (a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to: (1) possession of a current foreign passport;… (3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country;…(7) voting in a foreign election….

Applicant's possession of a Canadian passport before he became a U.S. citizen in 2002 is not disqualifying under the security clearance guidelines. However, in cases where a dual citizen holds a foreign passport or exercises other rights of foreign citizenship, and also wishes to be granted a security clearance, a security concern arises and further inquiry is required. Conduct that constitutes an exercise of foreign citizenship can be disqualifying if it occurs after an applicant becomes a U.S. citizen. Applicant exercised the rights of a Canadian citizen by possessing a valid foreign passport, by using it in 2005 and 2006, by receiving Canadian health benefits in 2004, and by voting in a Canadian election in 2004. His actions occurred after he became a U.S. citizen in 2002, and represent an exercise of foreign citizenship rights. AG ¶¶ 10(a)(1), 10(a)(3), and 10(a)(7) apply.

Under AG ¶ 11, I considered the six mitigating conditions, and especially the following:

> (b) the individual has expressed a willingness to renounce dual citizenship;
>
> (e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated; and
>
> (f) the vote in a foreign election was encouraged by the United States Government.

In a March 2011 letter to his FSO, Applicant indicated his willingness to renounce his Canadian citizenship and to forego the rights of that citizenship. He also reiterated his willingness at the hearing. His FSO confirmed that Applicant destroyed his foreign passport, and surrendered the invalidated passport to him. AG ¶ 11 (b) and (e) apply. Applicant voted in a Canadian election in 2004, after he was a U.S. citizen. There is no evidence that his voting was encouraged by the U.S. Government. AG ¶ 11 (f) does not apply.

Whole-Person Analysis

Under the whole-person concept, an administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the relevant circumstances. An administrative judge should consider 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the cited guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant held a Canadian passport, voted in a Canadian election, and used the Canadian healthcare system, all while holding U.S. citizenship. The security concern raised by possession of a foreign passport can be mitigated if the passport is destroyed, invalidated or surrendered to a cognizant security authority. Applicant surrendered the Canadian passport, as required under the Directive, and also indicated his willingness to renounce his Canadian citizenship. He has not voted in a Canadian election in seven years. Moreover, he is a registered U.S. voter, and voted in the 2008 U.S. presidential election.

Applicant possessed and used a foreign passport to travel. However, he has not used his Canadian passport since 2006. He consciously decided to use his U.S. passport exclusively, even before he began employment with a U.S. defense contractor. He travels extensively in support of the U.S. Government, and has used only his U.S. passport for 40 to 50 foreign trips over the past five years. His use of his U.S. passport since 2006, including to enter and exit his country of birth, even when his

Canadian passport was valid, supports his claim that he considers himself only a U.S. citizen.

Overall, the record evidence satisfies the doubts raised about Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from the cited adjudicative guideline.

Formal Findings

Paragraph 1, Guideline C	FOR APPLICANT
Subparagraph 1.a. - 1.c.	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to allow Applicant access to classified information. Applicant's request for a security clearance is granted.

RITA C. O'BRIEN
Administrative Judge