**DEPARTMENT OF DEFENSE**
**DEFENSE OFFICE OF HEARINGS AND APPEALS**

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| In the matter of: | ) | |
| | ) | |
| ---------- | ) | ISCR Case No. 12-04023 |
| | ) | |
| Applicant for Security Clearance | ) | |

## Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

01/06/2015

## Decision

HARVEY, Mark, Administrative Judge:

Applicant is a citizen and resident of Canada. He has strong connections to Canada. Financial considerations and personal conduct concerns are mitigated; however, foreign influence and foreign preference concerns are not mitigated. Eligibility for access to classified information is denied.

## Statement of the Case

On April 20, 2011, Applicant signed an Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86) (Government Exhibit (GE) 1). On February 28, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to him, alleging security concerns under Guidelines B (foreign influence), C (foreign preference), F (financial considerations), and E (personal conduct). (Hearing Exhibit (HE) 2) The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) as revised by the Under Secretary of Defense for Intelligence on August 30, 2006, which became effective on September 1, 2006.

Based on information available to the Government, DOD adjudicators could not make the preliminary affirmative finding that it is clearly consistent with the national

interest to grant or continue Applicant's security clearance, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be granted, continued, denied, or revoked. (HE 2)

On May 15, 2014, Applicant responded to the SOR. (HE 3) On June 30, 2014, Department Counsel was prepared to proceed. On July 3, 2014, DOHA assigned the case to me. On October 29, 2014, November 5, 2014, and November 19, 2014, DOHA issued notices of the hearing, setting the hearing for November 20, 2014. (HE 1B-1D) On November 26, 2014, DOHA issued a hearing notice, setting the hearing for December 2, 2014. (HE 1A) Applicant waived his right to 15 days of notice of the date, time, and place of the hearing. (Tr. 16-17) The hearing was held on December 2, 2014. I received the transcript of the hearing on December 10, 2014.

## Procedural Rulings

At the hearing, Department Counsel offered five exhibits, and Applicant offered nine exhibits. (Tr. 20-25; GE 1-5; AE A-I) There were no objections, and I admitted all proffered exhibits into evidence. (Tr. 21, 25-26; GE 1-5; AE A-I)

I took administrative notice (AN) of facts from the U.S. Department of State website concerning Canada.[1] Administrative or official notice is used for administrative proceedings. *See* ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004) and *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). Usually administrative notice at ISCR proceedings is accorded to facts that are either well known or from government reports. *See* Stein, ADMINISTRATIVE LAW, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice).

## Findings of Fact[2]

Applicant's SOR response admitted the allegations in SOR ¶¶ 1.a to 1.h, 2.c to 2.g, 3.a, and 4.a, and he provided mitigating information. (HE 3) He denied the remaining allegations. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is a 49-year-old chief software engineer, who seeks a security clearance to facilitate his work with a DOD contractor. (Tr. 6, 31) In 1984, he graduated from high school. (Tr. 6) In 1989, he was awarded a bachelor's of applied science in engineering degree from a Canadian university. (Tr. 7) He married in 1990, began

[1] *See* Bureau of Western Hemisphere Affairs, "U.S. Relations With Canada Fact Sheet" (Sept. 10, 2014), http://www.state.gov/r/pa/ei/bgn/2089.htm.

[2] To protect Applicant and his family's privacy, the facts in this decision do not specifically describe employment, names of witnesses, and names of other groups or locations. The cited sources contain more specific information.

divorce proceedings in 2004, and was divorced in 2014. (Tr. 7) His daughter is 16, and his stepson is 15. (Tr. 8)

**Foreign Influence**

Applicant is a dual United States and Canadian citizen, who resides in Canada. (SOR ¶ 1.a) His mother, father, sister, and child are citizens and residents of Canada. (Tr. 131-133; SOR response to ¶¶ 1.b-1.e) His common-law partner is a citizen and resident of Canada. (Tr. 113; SOR ¶ 1.g) Applicant and his partner have lived together for eight years. (Tr. 114) His partner is a director of marketing in a company, which is not associated with the Canadian Government. (Tr. 115) Applicant has extensive contacts with Canadian citizens, including members of his partner's family. (Tr. 116) He has close and frequent contacts with his family members living in Canada. (Tr. 132-133) His grandmother was a citizen and resident of Canada, and she is now deceased. (Tr. 133; SOR ¶ 1.f)

Applicant has Canadian bank accounts with about $5,000 in them. (Tr. 134; SOR response to ¶ 1.h) He receives his pay from the DOD contractor by direct deposit into a Canadian bank. (Tr. 128) He does not have a Canadian retirement account, as alleged in SOR ¶ 1.i because it was cashed out to fund legal expenses connected to his divorce. (Tr. 134-135) He does not control $100,000 from the sale of his home in Canada, as alleged in SOR ¶ 1.j because the funds were either paid to his former spouse or to creditors. (Tr. 135-136) Applicant may inherit property in Canada from his mother. (Tr. 122)

**Foreign Preference**

Applicant surrendered his Canadian passport to his security representative. (Tr. 118-119; SOR ¶ 2.a) He previously used his Canadian passport for international travel. (Tr. 118-119) Prior to his hearing, Applicant said he would probably renew his Canadian passport. (Tr. 120; GE 1) At his hearing, he said he did not see any reason why he would need to renew his Canadian passport after it expires, and he would probably not renew it. (Tr. 119-121)

Applicant's college attendance in Canada was subsidized by the Canadian Government; and his health insurance is provided by a province of the Canadian Government. (Tr. 122-123; SOR response to ¶¶ 2.b-2.c) His father supported his attendance at the Canadian college, which was primarily based on his father's Canadian employment.

Applicant participates in a Canadian pension plan and social insurance plan; he pays Canadian taxes; he votes in Canadian elections; and he has a Canadian driver's license. (Tr. 127-130, 134, 137; SOR response to ¶¶ 2.d-2.g) He works out of a home office located in Canada. (Tr. 127) Applicant and his partner planned to continue to live in Canada for at least another five years. (Tr. 158)

## Financial Considerations

Applicant filed for Canadian Chapter 13 Bankruptcy in August 2008, and his debts were discharged in June 2012. (Tr. 138; SOR response to ¶ 3.a) Applicant went through a difficult, litigious, and expensive divorce. (Tr. 102-107) He is required to pay spousal support as follows: $3,000 monthly in 2014; $2,900 monthly in 2015; $2,500 monthly in 2016; and $2,000 monthly in 2017. (Tr. 111) His child support responsibility is $1,040 monthly until August 2016. (Tr. 109, 111) He is able to maintain a budget and pay his expenses. (Tr. 113, 159-160; SOR response; GE 3)

The SOR alleges that Applicant had an unpaid debt that was referred for collection originating from a U.S. bank in the amount of $28,050. (SOR ¶ 3.b) Applicant had no knowledge of this debt, and it would have been difficult for him to borrow in the midst of his Canadian bankruptcy. (Tr. 108) Applicant planned to dispute the debt. (Tr. 109, 147-148)

## Personal Conduct

DOHA interrogatories asked Applicant to provide federal income tax transcripts from 2008 to 2012, and Applicant failed to do so. (SOR ¶ 4.a) As part of his May 15, 2014 SOR response, Applicant provided unsigned and undated copies of his U.S. federal tax returns for 2008-2012, and he said his 2008 Canadian taxes were settled on May 8, 2014. (HE 3) In November 2014, he filed his federal income tax returns for 2009 to 2012. (Tr. 107, 144, 157) He received a U.S. federal income tax credit for Canadian taxes paid, and he did not file his U.S. federal income tax returns sooner because there was no tax owed. (Tr. 157; SOR response) He did not investigate whether he could have paid his U.S. federal income taxes and then sought a credit for U.S. federal income taxes paid on his Canadian tax returns. (Tr. 158) He requested relief in regard to his 2008 tax filing, and he has not filed his 2008 tax return. (Tr. 107, 144) Applicant provided the following U.S. federal income tax information:

| **Tax Year** | **2002** | **2003** | **2004** | **2005** | **2006** | **2007** |
|---|---|---|---|---|---|---|
| **Gross Income** | $146,466 | $140,192 | $131,807 | $106,706 | $110,626 | $145,966 |
| **Foreign Tax Credit** | $37,371 | $28,818 | $28,532 | $22,094 | $22,941 | $32,531 |
| **Federal Income Taxes due** | $3,363 | $2,304 | $2,234 | $0 | $68 | $153 |

| **Tax Year** | **2008** | **2009** | **2010** | **2011** | **2012** |
|---|---|---|---|---|---|
| **Gross Income** | $134,080 | $83,535 | $119,011 | $151,901 | $133,492 |
| **Foreign Tax Credit** | $29,015 | $14,731 | $24,414 | $33,489 | $28,108 |
| **Federal Income Taxes due** | $5,772 Refund | $6,055 refund | $105 refund | $0 | $0 |

## Connections to the United States

Applicant was born in the United States, and he lived in the United States for the first four or five years of his life. (Tr. 152) He lived in the United States from 1989 to 1993 or 1994. (Tr. 121-122) His total time in the United States is about ten years. (Tr. 153) He votes in U.S. presidential elections. (Tr. 137) He states that he is loyal to the United States, and he would conscientiously comply with the requirements for access to classified information. (Tr. 152) Applicant's parents and sister are not U.S. citizens. (Tr. 155) He does not have a U.S. driver's license. (Tr. 155-156)

## Character Evidence

Applicant worked on various projects over the years that contributed to the U.S. national interests. (Tr. 98) He had access to sensitive, but not classified information. (Tr. 98-99) The lack of a security clearance limited his contributions to the United States. (Tr. 99-100)

Applicant's employer and company president has known Applicant for 20 years. (Tr. 31; AE C) His acquisition program manager has known Applicant since May 2013. (Tr. 45-46) The lead systems engineer on the program knows Applicant from when they were working on the current project together. (Tr. 56-57) An active duty lieutenant commander, who is the program test director, has known Applicant from when they were working on the current project together. (Tr. 63-64) The company's chief financial officer has known Applicant for about 20 years. (Tr. 69-70; AE B) The company's chief of operations is a retired Navy officer and Applicant's supervisor, who has known Applicant since 2006. (Tr. 80-87; AE D) A former manager worked with Applicant for four years when Applicant was a consultant. (AE F) A U.S. Marine has known Applicant for 16 years. (AE G) An engineering project manager has worked with Applicant for seven years. (AE H) A systems engineer has known Applicant personally and professionally. (AE I) Applicant's references described Applicant as thorough, professional, generous, discrete, reliable, honest, loyal, conscientious, trustworthy, intelligent, articulate, and invaluable to his company. (Tr. 32-93; AE B-I) They supported approval of his access to classified information. (Tr. 32-93; AE B-I)

## Canada

Canada is a democracy, with a relatively low level of crime, and the threat of terrorism is modest. The Canadian Government complies with the rule of law and protects civil liberties. The United States and Canadian Governments are allies in the war on terrorism. Canada and the United States have close relationships in diplomacy and trade. The State Department's U.S. Canada Relations Fact Sheet, *supra* note 1, provides as follows:

> The United States and Canada share two borders and their bilateral relationship is one of the closest and most extensive in the world. It is reflected in the high volume of bilateral trade--more than $2 billion a day in goods and services--and in people-to-people contact. About 300,000

people cross between the countries every day by all modes of transport. In fields ranging from security and law enforcement to environmental protection to free trade, the two countries work closely together on multiple levels, from federal to local.

U.S. defense arrangements with Canada are more extensive than with any other country. The Permanent Joint Board on Defense provides policy-level consultation on bilateral defense matters. The United States and Canada share North Atlantic Treaty Organization (NATO) mutual security commitments, and U.S. and Canadian military forces cooperate on continental defense within the framework of the binational North American Aerospace Defense Command (NORAD).

The Beyond the Border initiative outlines a cooperative vision for perimeter security and economic competitiveness. The United States and Canada work in partnerships within, at, and away from our borders to achieve enhanced security and accelerate the legitimate flow of people, goods, and services between our two countries. The effort also includes collaboration in areas such as counterterrorism, aviation and maritime security, health security, visa screening, trusted traveler and trusted trader programs, emergency management, critical infrastructure protection, and cybersecurity. Extensive law enforcement ties include collaboration in risk assessment/analysis, incident management, and coordinated messaging. Successful joint law enforcement programs with Canada include the Integrated Border Enforcement Teams (IBET), Border Enforcement Security Taskforces (BEST), and the ShipRider Integrated Cross Border Maritime Law Enforcement program. The Cross Border Crime Forum (CBCF), chaired by the U.S. Attorney General and the Secretary of Homeland Security with Canadian counterparts, meets regularly. More recent efforts include improvement of cross-border law enforcement radio interoperability.

U.S. Customs and Border Protection (CBP) conducts preclearance operations at eight Canadian airports, allowing air travelers to complete customs and immigration procedures before boarding their flight to the United States. The two countries intend to enhance preclearance operations and expand them to cover land, rail, and ferry/cruise travel as part of the Beyond the Border Action Plan.

The United States and Canada cooperate to resolve and manage transboundary environmental and water issues. A principal instrument of this cooperation is the International Joint Commission, established under the 1909 Boundary Waters Treaty. Under the Columbia River Treaty, Canada and the United States jointly regulate and manage the Columbia River as it flows from British Columbia into the United States. The two countries cooperate on a range of bilateral fisheries issues and

international high seas governance initiatives, and are both founding members of the Arctic Council.

The bilateral Clean Energy Dialogue is charged with expanding clean energy research and development, developing and deploying clean energy technology, and building a more efficient electricity grid based on clean and renewable energy. These efforts will reduce greenhouse gases and combat climate change in our shared air environment. Canada is an ally of the United States in international climate change negotiations. Canada participates in the multilateral Major Economies Forum on Energy and Climate; the Asia Pacific Partnership on Clean Development and Climate, which aims to accelerate clean energy technologies in major industrial sectors; and the International Carbon Sequestration Leadership Forum, which researches effective ways to capture and store carbon dioxide.

* * *

**Bilateral Economic Relations**

The United States and Canada share the world's largest and most comprehensive trading relationship, which supports millions of jobs in each country. Canada is the single largest foreign supplier of energy to the United States. Canada is the third largest holder of oil reserves after Saudi Arabia and Venezuela and is the only non-OPEC member in the top five. Canada and the United States operate an integrated electricity grid under jointly developed reliability standards. Uranium mined in Canada helps fuel U.S. nuclear power plants.

The North American Free Trade Agreement (NAFTA) among the United States, Canada, and Mexico has reduced trade barriers and established agreed upon trade rules. It has resolved long-standing bilateral irritants and liberalized rules in several areas: including agriculture, services, energy, financial services, investment, and government procurement. The Regulatory Cooperation Council seeks to stimulate even more trade by increasing bilateral regulatory transparency and cooperation and eliminating unnecessary differences and duplication that hinder trade and investment.

Canada and the United States have one of the world's largest investment relationships. The United States is Canada's largest foreign investor, and Canada is the third-largest foreign investor in the United States. U.S. investment is primarily in Canada's mining and smelting industries, petroleum, chemicals, the manufacture of machinery and transportation equipment, and finance. Canadian investment in the United States is concentrated in finance and insurance, manufacturing, banking, information and retail trade, and other services.

Bilateral trade disputes are managed through bilateral consultative forums or referral to NAFTA or World Trade Organization (WTO) dispute resolution procedures. Canada has challenged U.S. trade remedy law under NAFTA and the WTO dispute settlement mechanisms. Canadian goods are exempted from the American Recovery and Reinvestment Act's "Buy American" provisions. The United States has encouraged Canada to strengthen its intellectual property laws and enforcement. In October 2012, Canada joined the United States and other countries in negotiation of the Trans-Pacific Partnership regional trade agreement.

**Canada's Membership in International Organizations**

In addition to their close bilateral ties, Canada and the United States cooperate in multilateral fora, including international efforts to combat terrorist financing and money laundering. The two countries belong to a number of the same international organizations, including the United Nations, NATO, WTO, G7, G20, Organization for Security and Cooperation in Europe, Organization for Economic Cooperation and Development, Organization of American States, and Asia-Pacific Economic Cooperation forum.

## Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id*. at 527. The President has authorized the Secretary of Defense or his designee to grant applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation

about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. *See also* Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

## Analysis

### Foreign Influence

AG ¶ 6 explains the security concern about "foreign contacts and interests" stating:

> [I]f the individual has divided loyalties or foreign financial interests, [he or she] may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

AG ¶ 7 indicates four conditions that could raise a security concern and may be disqualifying in this case:

(a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;

(b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information;

(d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion; and

(e) a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation.

Applicant was born in the United States and educated in Canada. His parents, partner, sibling, child, and his spouse's family are all Canadian citizens and live in Canada. He pays Canadian income taxes, and the Canadian equivalent of U.S. Social Security and Medicare taxes. His monthly check for his work on behalf of a DOD contractor is deposited into a Canadian bank. He has lived in Canada for 39 out of 49 years. He has been a resident of Canada since 1995, and he did not express an intention to move to the United States in the next five years.

AG ¶ 7(d) applies because Applicant lives with his partner in Canada. She is a citizen and resident of Canada, and she is not a citizen of the United States. His partner is close to her family and friends and values her Canadian employment.

There is a rebuttable presumption that a person has ties of affection for, or obligation to, their immediate family members. *See generally* ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at *8 (App. Bd. Feb. 20, 2002). Applicant has ties of affection and obligation to his partner. "[A]s a matter of common sense and human experience, there is [also] a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse." ISCR Case No. 07-17673 at 3 (App. Bd. Apr. 2, 2009) (citing ISCR Case No. 01-03120 at 4 (App. Bd. Feb. 20, 2002)). This concept is the basis of AG ¶ 7(d).

Applicant's partner's communications with her family, who are citizens and residents of Canada, are not fully described in the record, and there is insufficient evidence to establish a security concern in regard to her partner's relationships with her family and friends living in Canada.

Applicant's possession of close family ties with his partner, parents, child, and sibling living in Canada, is not, as a matter of law, disqualifying under Guideline B.

However, if an applicant or their partner has a close relationship with even one relative, living in a foreign country, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. *See Generally* ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

The nature of a nation's government, its relationship with the United States, and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion or inducement. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government or the country is known to conduct intelligence collection operations against the United States. His relatives and the Canadian Government do not have any of these attributes The relationship of Canada with the United States places a low burden of persuasion on Applicant to demonstrate that his family and friends living in Canada do not pose a security risk. Nevertheless, the Appeal Board has required a foreign influence analysis in situations involving close United States allies. *See, e.g.*, ISCR Case No. 08-02864 at 2-6 (App. Bd. Dec. 29, 2009) (reversing grant of clearance in part because of applicant's connections to Germany); ISCR Case No. 07-14151 at 2-4 (App. Bd. Sept. 10, 2008) (reversing grant of clearance because of applicant's connections to Mexico); ISCR Case No. 07-00434 at 2-4 (App. Bd. July 18, 2008) (affirming denial of clearance for applicant with connections to Belgium and Canada). Applicant should not be placed in a position where he might be forced to choose between loyalty to the United States and a desire to assist Canada or his family living in Canada.

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004). Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. *See* ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002).

While there is no evidence that intelligence operatives or terrorists seek or have sought classified or economic information from or through Applicant, his partner, or his family living in Canada, nevertheless, it is not possible to rule out such a possibility in the future. International terrorist groups are known to conduct intelligence activities as effectively as capable state intelligence services. Applicant's relationships with family members living in Canada create a potential conflict of interest because these relationships are sufficiently close to raise a security concern about his desire to assist his family members in Canada by providing sensitive or classified information. Department Counsel produced substantial evidence of Applicant's contacts with his partner and family living in Canada. Department Counsel has raised the issue of

potential foreign pressure or attempted exploitation, and further inquiry is necessary about potential application of any mitigating conditions.

AG ¶ 8 lists six conditions that could mitigate foreign influence security concerns including:

> (a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;
>
> (b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;
>
> (c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation;
>
> (d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;
>
> (e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country; and
>
> (f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

> Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan*, *supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

SOR ¶ 1.f is mitigated because Applicant's grandmother has passed away. SOR ¶¶ 1.i and 1.j are mitigated because his retirement fund and the funds received from the sale of his home in Canada were liquidated to pay his debts.

AG ¶¶ 8(a) and 8(c) have limited applicability. Applicant has frequent contact with his partner, parents, child, and sister, who are living in Canada. His loyalty and connections to his family living in Canada are positive character traits. However, for security clearance purposes, those same connections negate the possibility of mitigation under AG ¶ 8(a), and Applicant failed to fully meet his burden of showing there is "little likelihood that [his relationships with partner and his relatives who are Canadian citizens] could create a risk for foreign influence or exploitation."

AG ¶ 8(b) partially applies. A key factor in the AG ¶ 8(b) analysis is Applicant's "deep and longstanding relationships and loyalties in the U.S." Applicant has some connections to the United States. He was born in the United States, and he lived for about 10 out of 49 years of his life in the United States. He is loyal to the United States, and he said he would conscientiously comply with the requirements for access to classified information. He has contributed to the U.S. national defense though his work for U.S. Defense contractors.

Applicant's relationship with the United States must be weighed against the potential conflict of interest created by his close relationships with his partner and family living in Canada. His parents, sister, and child are not U.S. citizens or residents of the United States, and he does not have a U.S. driver's license. There is no evidence, however, that terrorists, criminals, the Canadian Government, or those conducting espionage have approached or threatened Applicant, his partner, or their family to coerce Applicant for classified or sensitive information. As such, there is a low possibility that Applicant or his partner or family living in Canada would be specifically selected as targets for improper coercion or exploitation.

While the U.S. Government does not have any burden to prove the presence of such evidence, if such record evidence were present, Applicant would have a heavier evidentiary burden to mitigate foreign influence security concerns. It is important to be mindful of the United States' sizable financial and diplomatic investment in Canada and the close military relationship between the two countries.

AG ¶¶ 8(d) and 8(e) do not apply. The U.S. Government has not encouraged Applicant or his spouse's involvement with family members living in Canada. Applicant is not required to report his contacts with citizens or residents of Canada. AG ¶ 8(f) has limited application because it is only available to mitigate security concerns arising under AG ¶ 7(e).[3] Applicant does not have investments in the United States.

[3]AG ¶ 7(e) reads, "a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation."

In sum, Applicant's close connections to his partner and his family living in Canada are significant. Although Applicant has some connections to the United States, they are insufficient to outweigh his connections to Canada as well as his connection to his partner and family living in Canada. These connections raise an unmitigated foreign influence security concern under Guideline B.

**Foreign Preference**

AG ¶ 9 describes the foreign preference security concern stating, "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."

AG ¶ 10 describes one condition with seven subparts that could raise a security concern and may be disqualifying in Applicant's case. AG ¶ 10(a) provides:

> (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;
>
> (2) military service or a willingness to bear arms for a foreign country;
>
> (3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country;
>
> (4) residence in a foreign country to meet citizenship requirements;
>
> (5) using foreign citizenship to protect financial or business interests in another country;
>
> (6) seeking or holding political office in a foreign country; and
>
> (7) voting in a foreign election.

The scope of AG ¶ 10 is not limited to the specifically enumerated disqualifying conditions and includes obtaining and renewing a Canadian passport; coverage by the Canadian health plan, even though he may not have received benefits from the plan; participation in the Canadian equivalent of the U.S. Social Security and Medicare plans; payment of Canadian income taxes; and voting in Canadian elections; obtaining and using a Canadian driver's license. AG ¶ 10(a) applies.

AG ¶ 11 provides six conditions that could mitigate security concerns in this case:

(a) dual citizenship is based solely on parents' citizenship or birth in a foreign country;

(b) the individual has expressed a willingness to renounce dual citizenship;

(c) exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor;

(d) use of a foreign passport is approved by the cognizant security authority;

(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.

AG ¶ 11(e) applies to Applicant's Canadian passport. He surrendered it to his security officer, and SOR ¶ 2(a) is mitigated. Applicant's use of the Canadian scholarship in SOR ¶ 2(b) is mitigated because he attended college based primarily on his father's Canadian employment and residency in Canada.

SOR ¶¶ 2(c) to 2(g) are not mitigated and are connected to his residency in Canada for the previous 19 years. He has shown a very strong preference for Canada, and there is every indication he is a good Canadian citizen and resident. Foreign preference concerns are not mitigated.

**Financial Considerations**

AG ¶ 18 articulates the security concern relating to financial problems:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts;" and "(c) a history of not meeting financial obligations." Applicant admitted his Canadian Chapter 13 Bankruptcy, and a credit report alleged that Applicant had an unpaid debt that was referred for collection originating from a U.S. bank in the amount of $28,050. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 are potentially applicable:

> (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
>
> (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;
>
> (c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;
>
> (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;[4] and
>
> (e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

AG ¶¶ 20(a) to 20(c) apply to Applicant's Canadian Chapter 13 Bankruptcy. Applicant accrued delinquent debt at least in part because of his divorce. He made the required payments into his bankruptcy payment plan, and his debts were discharged in 2012.

AG ¶ 20(e) applies to the debt in SOR ¶ 2.b. Applicant had no knowledge of this $28,050 debt. It would have been difficult for him to borrow in the midst of his Canadian bankruptcy. Applicant planned to dispute the debt. There is no evidence that the creditor has sought to enforce this debt by obtaining a judgment or garnishing Applicant's pay.

[4]The Appeal Board has previously explained what constitutes a good-faith effort to repay overdue creditors or otherwise resolve debts:

> In order to qualify for application of [the good-faith mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term "good-faith." However, the Board has indicated that the concept of good-faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the good-faith mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

Applicant admitted responsibility for and took reasonable and responsible actions to resolve his debts through bankruptcy. There are clear indications the problem is being resolved and is under control. His efforts are sufficient to fully mitigate financial considerations security concerns.

**Personal Conduct**

AG ¶ 15 expresses the security concern pertaining to personal conduct:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.
>
> The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:
>
> (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and
>
> (b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying in this case:

> (c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; and
>
> (d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes

> but is not limited to consideration of: . . . (3) a pattern of . . . or rule violations.

Both disqualifying conditions apply. The Government produced substantial evidence that Applicant failed to provide his 2008 to 2012 IRS tax transcripts even though DOHA requested that he provide them. The burden of proof shifts to Applicant to explain, refute, or mitigate these disqualifying conditions.

AG ¶ 17 provides one condition that could mitigate security concerns in this case. AG ¶ 17(f) provides, "the information was unsubstantiated or from a source of questionable reliability." The allegation that Applicant failed to provide IRS tax transcripts for the years 2008 to 2012 is not substantiated in light of his filing his tax returns from 2009 to 2012 in November 2014. The requested tax transcripts would not be generated by the IRS until after the tax returns were filed or generated by the IRS. The SOR did not allege that he failed to file his U.S. federal income tax returns when required under Guidelines E or F, and this failure is not held against him because the conduct is not alleged in the SOR. Personal conduct concerns are mitigated.

**Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guidelines B, C, F, and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

The factors weighing towards approval of Applicant's security clearance are less substantial than the factors weighing against its approval. There is no evidence that Applicant has engaged in criminal activity, abused alcohol or illegal drugs, or committed any security violations. He was born in the United States and lived in the United States for about 10 years. His employer is a DOD contractor. He votes in U.S. elections. There

is no evidence that terrorists or other foreign elements have specifically targeted Applicant since a U.S. Government contractor began employing him.

A Guideline B decision concerning Canada must take into consideration the geopolitical situation and any dangers there.[5] Canada is relatively safe. The Canadian Government complies with the rule of law and protects civil liberties. The United States and Canadian Governments are allies in the war on terrorism. Canada and the United States have close relationships in diplomacy, military affairs, and trade. Notwithstanding this close relationship, Canada and the United States may have serious policy disputes in the future. It cannot be ruled out that at some future time Canadian entities may seek classified or sensitive information from Applicant.

Numerous impressive character witnesses, some of whom have worked with Applicant for decades, described Applicant as thorough, professional, generous, discrete, reliable, honest, loyal, conscientious, trustworthy, intelligent, articulate, and invaluable to his company. They supported approval of his access to classified information.

The significant foreign influence and preference security concerns outweigh the evidence in support of his approval of access to classified information. Applicant's partner, parents, child, and sibling are citizens and residents of Canada. Applicant is a citizen of Canada, has lived in Canada for the last 19 years, and plans to live in Canada for at least the next five years. He pays into the Canadian health plan and Canadian taxes. He complies with Canadian law. His pay is by direct deposit into a Canadian bank. He has a Canadian driver's license, but not a U.S. driver's license.

I have carefully applied the law, as set forth in *Department of Navy v. Egan,* 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Although financial considerations and personal conduct concerns are mitigated, I conclude Applicant has not carried his burden and foreign influence and foreign preference concerns are not mitigated. Eligibility for access to classified information is denied.

## Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

| | |
|---|---|
| Paragraph 1, Guideline B: | AGAINST APPLICANT |
| Subparagraphs 1.a to 1.e: | Against Applicant |
| Subparagraph 1.f: | For Applicant |
| Subparagraphs 1.g and 1.h: | Against Applicant |
| Subparagraphs 1.i and 1.j: | For Applicant |

[5] See ISCR Case No. 04-02630 at 3 (App. Bd. May 23, 2007) (remanding because of insufficient discussion of geopolitical situation and suggesting expansion of whole-person discussion).

| | |
|---|---|
| Paragraph 2, Guideline C: | AGAINST APPLICANT |
| Subparagraphs 2.a and 2.b: | For Applicant |
| Subparagraphs 2.c to 2.g: | Against Applicant |
| | |
| Paragraph 3, Guideline F: | FOR APPLICANT |
| Subparagraphs 3.a and 3.b: | For Applicant |
| | |
| Paragraph 4, Guideline E: | FOR APPLICANT |
| Subparagraph 4.a: | For Applicant |

## Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

_____
Mark Harvey
Administrative Judge