KEYWORD: Guideline B; Guideline C; Guideline M

DIGEST: Applicant failed to demonstrate that he had relinquished his foreign passport. Accordingly, the Judge concluded that he had failed to meet his burden of proof as to mitigation of the Guideline C security concerns. Adverse decision affirmed.

CASENO: 08-01980.a3

DATE: 10/29/2009

DATE: October 29, 2009

In Re:	)	
	)	
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	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 14, 2008, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence), Guideline C (Foreign Preference), and Guideline M (Use of Information Technology Systems) of Department

of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On March 24, 2009, after the hearing, Administrative Judge Erin C. Hogan denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. Applicant's appeal brief explicitly relied on evidence that was not before the Judge. Department Counsel filed a response to Applicant's brief stating that under the facts of this case expedited remand would be the equitable resolution to put the pertinent evidence before the Judge. Accordingly, the case was remanded to the Judge for further processing. The Judge issued a Remand Decision on May 6, 2009. Applicant again appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. The Appeal Board again remanded the case to the Judge for consideration of additional evidence. On July 29, 2009, the Judge issued a Second Remand Decision. Applicant again appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

On appeal, Applicant raises the following issue: whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Finding no harmful error, we affirm the Judge's decision.

The Judge made the following relevant findings of fact: Applicant was born and raised in Israel, where he completed the first two years of college. Applicant emigrated to the United States on a fiancé visa and became a United States citizen 1980. Applicant's mother and two brothers are citizens of and residents in Israel. Applicant's wife was born in Israel, but emigrated to the United States with her family when she was a small child. Applicant's wife became a United States citizen in 1968 and has no relatives in Israel. Applicant and his wife have four daughters, all of whom were born in the United States.

Applicant, his wife, and his daughters are all dual citizens of Israel and the United States. In 2007, Applicant and his wife and daughters traveled to Israel. All of them applied for Israeli passports. The Israeli government issued passports to Applicant and his daughters, but did not issue one to his wife. Applicant is not sure why, but assumes it is because his wife had lived in the United States for such a long time and had never applied for an Israeli passport before. Applicant's wife was able to enter Israel using her American passport, but had to wait in the non-Israeli citizen line in customs.

Applicant has strong ties to the United States and has no financial interests in Israel. At the hearing, Applicant stated that he is willing to renounce his Israeli citizenship and surrender his Israeli passport. Applicant has been told that the renunciation process will take approximately one year. Applicant believes he cannot surrender his passport to the Israeli Consulate until the renunciation process is complete. Applicant is concerned that he may need his Israeli passport to visit his mother if she should become ill. Applicant stated that he is willing to surrender his passport to the Facility Security Officer (FSO) of his employer, as long as the FSO agrees to retain the passport until Applicant has completed the renunciation of his Israeli citizenship.

The Judge found in Applicant's favor as to Guidelines B and M. Only the Judge's findings and conclusions as to Guideline C are at issue.

The Appeal Board's review of the Judge's findings of facts is limited to determining if they are supported by substantial evidence—"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 620 (1966).

In his appeal of the Judge's original decision, Applicant points to three factual errors. One is his job title. That is a harmless error. The second is the distance he traveled between job sites during a particular period. That is harmless error, particularly since the Judge ruled in Applicant's favor as to the incident involved. The third pertains to the Judge's characterization of the rules under which Applicant would travel to Israel if he no longer had an Israeli passport. Applicant clarifies the Judge's statement in this regard. To the extent that the Judge's characterization is not clear, it is in error. As explained below, the error is not harmful, since the clarification would be unlikely to change the outcome of the case. *See, e.g.,* ISCR Case No. 08-01105 at 2 (App. Bd. Dec. 15, 2008).

In finding against Applicant under Guideline C, the Judge discussed Foreign Preference Disqualifying Condition (FCDC) 10(a),[1] noting that Applicant renewed his Israeli passport on at least two occasions after becoming an American citizen. Decision at 8. The Judge then discussed the relevant Foreign Preference Mitigating Conditions (FCMC) 11(b)[2] and (e).[3] She explained that the record was held open for two weeks for Applicant to document that he had followed through on his stated intentions to begin the process of renouncing his Israeli passport and to surrender his passport to his FSO. The Judge stated that at the close of the record Applicant still possessed a foreign passport.[4] The Judge's statement is sustainable.

After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for her decision, "including a 'rational connection between

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[1]"(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;. . ." Directive ¶ E2.10(a).

[2]" [T]he individual has expressed a willingness to renounce dual citizenship;" Directive E2.11(b).

[3]"[T[he passport has been destroyed, surrendered to the cognizant security authority , or otherwise invalidated;" Directive ¶ E2.11(e).

[4]"Applicant had ample time prior to the hearing to address concerns related to his possession of a valid foreign passport. He did not do so but professed at hearing that he intended to do so within a week following the hearing. The record was held open for two weeks to allow him the opportunity to do so. Applicant had the burden to mitigate the security concerns raised under Guideline C involving the possession of a valid foreign passport. He ignored the instructions provided to him at hearing and did nothing during the two weeks the record was held open. The burden was on Applicant to mitigate the foreign preference concerns not the government or his security office. He took no action to ensure that his foreign passport was surrendered before the close of record." Second Remand Decision at 11.

the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Judge's decision that "it is not clearly consistent with national security to continue Applicant's eligibility for a security clearance" is sustainable on this record. Second Remand Decision at 13. *See also Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) ("The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'").

Order

The Judge's decision to deny Applicant a security clearance is AFFIRMED.

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

DISSENTING OPINION OF ADMINISTRATIVE JUDGE MICHAEL Y. RA'ANAN

Applicant raises errors in the Judge's third decision which, at least cumulatively, are harmful:

The Judge's decision says: "He renewed his Israeli passport because he believes it was the only way he could travel to Israel." Decision at 3. Actually, as Applicant notes it is not merely his belief, but it is Israeli law. This is confirmed by Government Administrative Notice Item II which says: "Israeli citizens, including dual nationals, must enter and depart Israel on their Israeli passports, and Israeli authorities may require persons whom they consider to have acquired Israeli nationality at birth to obtain an Israeli passport prior to departing Israel."

The Judge's decision says: "Under cross-examination, Applicant admitted that he could travel as a non-Israeli citizen to Israel. He would have to wait in the non-Israeli citizen line while arriving in the country." Decision at 3. That is not at all what Applicant testified to. He testified that *after renouncing* his Israeli citizenship he would be able to enter on the non-Israeli citizen line. Transcript 63-64. Here again Applicant's testimony is confirmed by the language cited above from Government Administrative Notice II.

The Judge's decision says: "Applicant arranged for his children to obtain Israeli passports when they traveled to Israel in 2007. They are U.S. citizens who were born in the U.S. and could have used U.S. passports. This action also indicates a preference for his home country. While not alleged in the SOR under foreign preference, the Appeal Board had determined that even though crucial security concerns are not alleged in the SOR, the Judge may consider those concerns when they are relevant and factually related to a disqualifying condition that was alleged in the SOR." Decision at 8. The Judge's premise is in error. This was not a choice by Applicant (except to the extent that they did not have to make the trip). His children could not use U.S. passports to enter and exit Israel. Again, the language from the Government's Administrative Notice Item II is directly on point as well as the following language from the same paragraph: "Israeli citizens naturalized in the United States retain their Israeli citizenship and children born in the United States to Israeli parents usually acquire both U.S. and Israeli nationality at birth."

Finally, the Judge's decision says: "His wife traveled to Israel on her U.S. passport and had to go through the line for non-Israeli citizens when entering Israel." Decision at 3. Applicant points to his explicit testimony that this was a unique circumstance for which Applicant's wife had obtained special permission in the form of a one-time letter from the Israeli government. Transcript p. 17.

The Judge's first decision seemed to say that Applicant was cleared on all allegations but his possession of a foreign passport. The cited errors were introduced after that decision was remanded (on a motion of both parties) to receive evidence that Applicant had surrendered the passport. The Judge's third decision relies in part on a credibility determination (which is not a substitute for evidence— *See, e.g.*, ISCR Case No. 04-04302 at 4 (App. Bd. Jun. 30, 2005)), presents Applicant's testimony in a mistakenly harsh light and introduces his children's circumstances, also in a mistakenly harsh light. On three of the four issues the Judge's description appears to be refuted and the Applicant's testimony confirmed by a *Government* exhibit offered for Administrative Notice.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board