DATE: December 7, 2001

In Re:

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

Applicant for Security Clearance

ISCR Case No. 00-0516

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Claude R. Heiny issued a decision, dated August 27, 2001, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the issue of whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated September 27, 2000. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence). Applicant submitted an answer to the SOR in which he stated he did not want to have a hearing in his case. A File of Relevant Material (FORM) was prepared, and a copy of the FORM was given to Applicant. No response to the FORM was received from Applicant.

The case was then assigned to the Administrative Judge for determination. The Judge issued a written decision, dated August 27, 2001, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Applicant's appeal from the Judge's adverse decision.

Scope of Review

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. *See* Directive, Additional Procedural Guidance, Item E3.1.32. *See, e.g.,* ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings. *See, e.g.*, ISCR Case No. 99-0205 (October 19, 2000) at p. 2.

When a challenge to an Administrative Judge's rulings or conclusions raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

Administrative Judge's Findings and Conclusions[(1)]

Applicant is 27-year-old man who has been employed by a defense contractor since July 1998.

Applicant was born in a foreign country (FC). Applicant's father is an FC citizen and his mother is a U.S. citizen. Applicant is a citizen of FC by birth, and a United States citizen by virtue of the fact his mother is a U.S. citizen. Applicant grew up in FC and attended school and university in FC.

Applicant obtained a U.S. passport in 1991 and used that passport when he traveled overseas in 1995 and 1996. Applicant has never been issued an FC passport.

Applicant came to the United States in July 1998 to take a position with his current employer, a defense contractor. Applicant has lived in the United States since July 1998. Applicant's wife is an FC citizen who has filed to obtain permanent U.S. residency.

Applicant has the right to vote in FC elections and U.S. elections, but has never voted in an election and does not intend to vote in any future elections. Applicant has not served in the FC military. Applicant does not intend to exercise or accept any rights, privileges, or benefits offered by the FC government.

In a written statement dated October 21, 1998, Applicant stated "I would renounce my [FC] citizenship for employment opportunities which would benefit my family." In a written statement dated October 28, 1998, Applicant stated "Under certain circumstances I would be willing to renounce my [FC] citizenship, for example: employment and/or future family considerations."

Applicant has been an FC citizen all his life and has recently come to the United States for economic reasons, and has lived in the United States only since July 1998. Applicant's willingness to renounce his FC citizenship is conditional and he has not taken any steps to renounce it. Applicant has not clearly demonstrated his principal preference is for the United States. When pressed to make a choice, Applicant may choose FC over the United States, which he has chosen solely for current economic opportunities.

Applicant has failed to overcome the security concerns raised by his dual citizenship. It is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Appeal Issue

On appeal, Applicant does not challenge the Administrative Judge's findings of fact. However, Applicant argues: (1) there is no showing that he has exercised dual citizenship that demonstrates a foreign preference; (2) although his roots and family are in FC, that does not indicate a preference for FC; (3) "I firmly believe that if I am a resident and citizen of the United States that my principal preference belongs with the United States"; (4) he strongly believes in the principles the United States was founded on and it is his desire to remain here; (5) his mother passed on to all her children her love of the United States; (6) it was wrong for the Judge to hold against him the fact that he has taken no steps to renounce his FC citizenship because "I was never asked to give up the [FC] citizenship; thus there should be no action expected"; (7) "Because I view my [FC] citizenship as a birthright - and not a show of foreign allegiance - I am not hasty to give it up. My allegiance is with the United States"; (8) Applicant and his wife have a daughter who is a

U.S. citizen, they consider themselves to be an American family, and they want to remain here and contribute to this country; and (9) Applicant loves his work and wants to continue it so he can provide valuable research and contribute to the United States. The Board construes Applicant's arguments as raising the issue of whether the Judge's adverse decision is arbitrary, capricious, or contrary to law.

The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. Furthermore, an appealing party cannot fairly allege that an Administrative Judge erred based on evidence that was not presented for the Judge's consideration. *See, e.g.*, ISCR Case No. 00-0581 (November 9, 2001) at p. 3.[(2)] Accordingly, the Board will not address appeal arguments that are based on assertions that constitute new evidence. Applicant's fourth, fifth, and eighth arguments are based on factual assertions that go beyond the record evidence below. Therefore, the Board will not address or consider those three arguments.

Applicant's first argument has merit. An applicant who has dual U.S.-foreign country citizenship and exercises the rights and privileges of his or her foreign citizenship has engaged in the exercise of dual citizenship that falls within the scope of Guideline C (Foreign Preference). In this case, the Administrative Judge made no finding that Applicant exercised the rights and privileges of FC citizenship. Absent such a finding, it was arbitrary and capricious for the Judge to conclude that Applicant engaged in the "exercise of dual citizenship."

Applicant's second, third, and seventh arguments do not demonstrate the Administrative Judge erred. Given the record evidence that Applicant was born in FC, grew up and was educated in FC, came to the United States to take a position with his current employer, has lived in the United States only since July 1998, and has expressed only a conditional willingness to renounce his FC citizenship, the Administrative Judge had a rational basis for concluding that the government satisfied its initial burden of proof because Applicant's case falls under the language of the Concern section of Guideline C (Foreign Preference). Furthermore, the Judge acted properly by considering the conditional nature of Applicant's statements about his willingness to renounce his FC citizenship. *See, e.g.*, ISCR Case No. 99-0295 (October 20, 2000) at p. 7. The Judge correctly noted that Applicant had the burden of presenting evidence to extenuate or mitigate the security concerns raised by the facts and circumstances of his case. *See* Directive, Additional Procedural Guidance, Item E3.1.15 ("The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."). The Judge also correctly noted that any doubts as to an applicant's security eligibility should be resolved in favor of the national security. The Judge considered the totality of the facts and circumstances of Applicant's case and articulated a sufficient basis for concluding Applicant has not demonstrated a principal preference for the United States over FC. Given that conclusion, the Judge had a sufficient basis to conclude that Applicant had not met his burden of demonstrating it is clearly consistent with the national interest to grant or continue a security clearance for him. *See, e.g.*, ISCR Case No. 98-0476 (December 14, 1999) at p. 5 (if the evidence shows an applicant is equivocal or ambivalent about whether he prefers the United States over a foreign country of which he is a citizen, the Judge should resolve doubts in favor of the national security).

Applicant's sixth argument does not show the Administrative Judge erred. The fact that the Department of Defense did not ask Applicant to renounce his FC citizenship did not preclude the Judge from considering Applicant's statements about whether he is willing to renounce his FC citizenship. Applicant's argument fails to be persuasive for two reasons. First, the Directive (including the Adjudicative Guidelines) is not aimed at regulating the conduct of officers and employees of defense contractors; rather, it is aimed at providing standards against which the conduct and circumstances of officers and employees of defense contractors are evaluated to determine whether it is clearly consistent with the national interest to grant or continue access to classified information for them. Regulation of the personal conduct of officers and employees of defense contractors falls under the jurisdiction of other governmental entities. Second, the fact that Applicant has the right to decide for himself whether he wishes to retain or renounce his FC citizenship does not mean that his decision on the matter cannot be considered in connection with determining his security eligibility. *See, e.g.*, ISCR Case No. 98-0331 (May 26, 1999) at p. 8 (applicant's right to decide whether to renounce his foreign citizenship does not preclude consideration of security significance of applicant's decision on the matter). Nothing in Executive Order 10865 or the Directive requires the government to demonstrate an applicant has engaged in illegal conduct before it can deny or revoke access to classified information. Furthermore, nothing in Executive Order 10865 or the Directive precludes the consideration of the security significance of conduct that is legally available to an applicant. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 3 (legality of applicant's exercise of rights under bankruptcy law

does not preclude government from considering negative security implications of applicant's financial problems that led to the bankruptcy); ISCR Case No. 98-0349 (February 3, 1999) at p. 3 (right of applicant to obtain discharge of debts in bankruptcy does not preclude consideration of security significance of applicant's overall history of financial difficulties). *Cf. Gayer v. Schlesinger*, 490 F.2d 740, 752-54 (D.C. Cir. 1973)(government entitled to deny security clearance to applicant who refused to provide information based on claim of privacy); *Clifford v. Shoultz*, 413 F.2d 868 (9th Cir. 1969) (government could suspend applicant's security clearance based on his refusal to answer questions based on claim of constitutional privilege), *cert. denied*, 396 U.S. 962 (1969).

Applicant's ninth argument does not demonstrate the Administrative Judge erred. Applicant's laudable desire to remain in the United States and to contribute to the United States through his employment is irrelevant to a determination as to his security eligibility. This case does not involve an adjudication of Applicant's right to remain in the United States, his right to seek lawful employment here, or his right to seek to make contributions to the United States. Rather, this case involves the making of a determination of whether it is clearly consistent with the national interests to grant or continue a security clearance for Applicant.

The Administrative Judge's decision is not a model of clarity. Furthermore, the Judge erred by concluding that Applicant engaged in the exercise of dual citizenship in the absence of a factual finding that would support such a conclusion. However, the Board does not measure a Judge's decision against a standard of perfection. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 3. Furthermore, the Board will affirm a Judge's decision if the appealing party demonstrates error that is harmless under the particular facts of this case. *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6. Applicant has demonstrated the Judge erred, but the Board concludes that the error is harmless under the particular facts of this case.

Conclusion

Applicant has not demonstrated error below that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to the SOR paragraphs under Guideline B (Foreign Influence). Department Counsel has not challenged those formal findings. Accordingly, the Judge's findings and conclusions concerning the SOR paragraphs under Guideline B are not at issue on appeal.

2. After receiving the FORM, Applicant had the opportunity to submit information for consideration by the Administrative Judge. No such submission was received from Applicant. Accordingly, Applicant waived the opportunity to present additional information for consideration by the Judge. *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 2.