DATE: January 10, 2002

In Re:

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

Applicant for Security Clearance

ISCR Case No. 00-0489

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Elizabeth M. Matchinski issued a decision, dated April 3, 2001, in which she 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 following issues: (1) whether there were prejudicial errors in the hearing transcript; (2) whether the Administrative Judge erred by applying a memorandum issued by the Assistant Secretary of Defense for Command, Control, Communications and Intelligence; and (3) 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 a Statement of Reasons (SOR) dated September 11, 2000 to Applicant. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence).

A hearing was held on January 31, 2001. The Administrative Judge issued a written decision, dated April 3, 2001, in which she 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.

After filing notice of appeal, Applicant asked for an extension of time to submit his appeal brief so that he could obtain a copy of a tape recording of his hearing. Applicant based his request on his contention that the hearing transcript contained serious inaccuracies. Department Counsel opposed Applicant's request for an extension of time. Applicant was granted additional time to pursue his request elsewhere in the Defense Office of Hearings and Appeal because the Chairman did not have jurisdiction or authority to grant or deny Applicant's request for a copy of a tape recording of his hearing. Applicant was unable to obtain a copy of a tape recording of his hearing.

Applicant filed an appeal brief and Department Counsel submitted a reply brief.

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

Applicant was born in a foreign country (FC) in 1945, and was raised with all the rights and privileges of an FC citizen.

Applicant came to the United States in 1968 to pursue graduate studies while his parents and three siblings remained resident citizens of FC. Applicant received his graduate degrees in the United States in 1970 and 1973.

By 1974, Applicant decided to become a permanent resident and citizen of the United States. To that end, Applicant applied for and received deferments from mandatory military service and the draft in FC.

After Applicant obtained permanent resident status in the United States, he elected to travel on documents issued by the United States instead of an FC passport. In 1978, the United States issued to Applicant travel documents based on his status as a permanent resident alien.

In 1982, Applicant became a naturalized U.S. citizen. Applicant was not required to relinquish his FC citizenship when he became a U.S. citizen and he took no action to do so. However, Applicant no longer voted in FC elections or accepted any educational, medical, or other benefits from FC.

In June 1982, Applicant was issued a U.S. passport, which he renewed on its expiration. Applicant used his U.S. passport exclusively when traveling abroad, using it to enter and exit FC. Applicant continued to maintain an FC passport on an intermittent basis (when he intended to travel to FC) to show to FC authorities for purposes of identification under various circumstances.

In 1994, Applicant found himself unemployed after a reduction in force. Applicant started his own consulting company in the United States. After Applicant learned of a joint initiative of the United States and FC governments to stimulate private business in FC, he traveled to FC in July 1997 as a self-employed independent consultant, farming out ideas for a project for potential funding under the joint initiative. For seven days in September 1997, Applicant served as a non-paid consultant for the FC geological survey agency. Applicant's business trip resulted in significant cost with no financial return as his proposal was not accepted.

Applicant returned to the United States and secured employment with a defense contractor in November 1998. At that time, Applicant looked for his current FC passport, but could find only the FC passport that had expired in December 1997. Because Applicant had applied for renewal of his FC passport, he disclosed on a security questionnaire that he had an FC passport as a means of identification to show FC origin, which was useful to prove his identity when in FC. Applicant also reported: his dual citizenship with the United States and FC; the FC citizenship and residency of his mother, his in-laws, his two brothers, and a sister; his travel to FC on three separate occasions.

Applicant applied to renew his FC passport in 1997 when he was in FC. Applicant stated that when he left FC, he forgot the new FC passport in FC or lost it. Applicant has his previous FC passport, which was canceled. The totality of the evidence indicates that Applicant's FC renewal application was granted. Applicant has tried to get or replace the FC passport because he did not want it to fall into the wrong hands and he wants to maintain the ability to identify himself when traveling to FC. On three or four occasions, Applicant has asked his sister in FC about the FC passport, but he has made no effort to contact FC authorities to determine whether the FC passport was in fact renewed.

In 1999, Applicant told an investigator: (a) all his foreign travel has been made with his U.S. passport; (b) he probably would be willing to relinquish the FC passport if required for him to get access to classified information, but he viewed renunciation of his FC citizenship as a denial of his FC birth; (c) he foresaw the possibility of having to travel to FC on an emergency or urgent basis to fulfill family obligations; (d) he denied he had any known obligation of FC citizenship; (e) although he referred to an inheritance on his security questionnaire, he indicated he was not aware of any specific financial asset in his name; (f) he denied any employment as an agent or official representative of FC; and (g) he denied any intent to use a position of trust in the United States to influence decisions in order to serve the interests of FC in preference to the United States.

Applicant traveled to FC in late 1999 to visit his sister who was suffering from a serious illness. Applicant entered FC using his U.S. passport. Apart from a couple inquiries of his sister (now deceased), Applicant made no effort to locate the FC passport renewed following his application in 1997.

As of the hearing, Applicant has not made an effort to contact FC authorities about his missing FC passport or to ask about procedures to surrender it because he hoped to be able to continue to maintain his FC passport for identification purposes for himself and his family. Applicant indicated that surrender of his FC passport would have implications for his family and his wife.

Applicant has no intent to renounce his FC citizenship, but he would relinquish his FC passport "with great reluctance" if it was mandated in order to get a security clearance.

Applicant's spouse is a naturalized U.S. citizen, and their two children are U.S. citizens by birth in this country. Applicant's mother, father-in-law, and two brothers are resident citizens of FC. Applicant's mother is a retired professor and his father-in-law is a retired businessman who had his own company selling food products. Applicant's brothers both are professionals in FC: one is a physician with his own medical practice, the other works at a clinic and teaches at a university which receives FC funding.

Applicant's father died in 1984. Applicant inherited a fractional proportion of his father's estate (including half a house which members of Applicant's family are currently using), but he realizes no financial benefit from his interest in his father's estate.

Former and current professional colleagues strongly support Applicant's application for a security clearance; they have confidence that Applicant would comply with the obligations of a security clearance.

Administrative Judge's Conclusions

Applicant's possession and use of an FC passport falls under the terms of the August 16, 2000 memorandum by the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASDC3I) concerning adjudication of security clearance cases involving foreign passports. Applicant's inability to locate his current FC passport does not eliminate security concerns because Applicant's renewal of the FC passport has Guideline C implications.

The fact that Applicant has misplaced his FC passport does not render the ASDC3I memorandum inapplicable to his case. Applicant's decision to make no effort to locate his missing FC passport does not amount to surrender of it under the terms of the ASDC3I memorandum. Moreover, Applicant's claim that he obtained and used an FC passport because he needed it to verify his identity to FC authorities for various purposes is a claim of necessity that is not recognized by the ASDC3I memorandum.

Applicant would like to maintain an FC passport for identification purposes and it was his intent to replace the missing FC passport. Applicant has expressed a willingness to relinquish his FC passport only if ordered to do so in order to obtain a security clearance. Applicant's conditional willingness to relinquish the FC passport, when coupled with his expressed unwillingness to relinquish his FC citizenship, is not enough to overcome the foreign preference concerns in this case, which are magnified by the presence of close family members in FC and Applicant's sense of familial obligation which makes him so reluctant to relinquish his FC passport.

There is a factual and logical connection between Applicant's renewal of his FC passport and his ties to family members in FC. The totality of the circumstances of Applicant's family ties in FC raise security concerns under Guideline B, and his statements about why he needs an FC passport do little to dispel those security concerns.

Applicant's efforts to seek out a possible business venture in FC in 1997 raises foreign preference concerns because it has not been established that his efforts were sponsored by the U.S. government or that his proposed projects for funding and individual contacts were consistent with U.S. interests.

Applicant's application for a security clearance is strongly supported by former and present professional colleagues. However, that support and Applicant's contributions to the defense industry are not enough to overcome the security concerns raised under Guideline C (Foreign Preference) and Guideline B (Foreign Influence). Because Applicant's financial interests in FC are minimal, SOR paragraph 2.b is found in his favor. However, adverse findings are warranted with respect to the rest of the SOR paragraphs (1.a, 1.b, 1.c, and 2.a).

It is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Appeal Issues

1. Whether there were prejudicial errors in the hearing transcript. Applicant contends there are 40 errors in the hearing transcript[(1)] and asserts that the "errors in the transcript raised enough concerns unrelated to the Applicant in the mind of the Administrative Judge that made the already heavy burden of proof placed on the Applicant impossible to meet."

The Board reviews an Administrative Judge's security clearance decision to determine whether or not the Judge made any factual or legal error that was harmful to the appealing party. Directive, Additional Procedural Guidance, Item E3.1.32. To the extent that an appealing party raises claims of procedural error, the Board must consider whether: (a) the alleged procedural errors occurred, and (b) if procedural errors did occur, did they result in any prejudice to the appealing party.

When a hearing is conducted, the presiding Administrative Judge personally hears the words spoken by the parties and witnesses, and there is a rebuttable presumption that a Judge considers all the record evidence unless the Judge specifically states otherwise. Therefore, even if there are errors in a hearing transcript, an appealing party must demonstrate that such errors: (a) resulted in factual or legal error by the Judge, and (b) that such errors were harmful to the appealing party. Without such a showing, the mere presence of errors in a hearing transcript does not constitute error that warrants remand or reversal.

Applicant specifically characterizes 12 alleged errors in the hearing transcript as "benign."[(2)] The Board must address "the material issues raised by the parties." Directive, Additional Procedural Guidance, Item E3.1.32. No useful purpose would be served by addressing alleged transcript errors that even Applicant characterizes as "benign."

Applicant characterizes 7 alleged errors in the hearing transcript as inaccuracies by the transcriber without stating whether he considers them as "benign" or "harmful" error.[(3)] After reviewing those 7 claims of error, the Board concludes that, even if the hearing transcript were in error as alleged by Applicant, the errors identified by Applicant would be essentially trivial ones that do not reflect any factual or legal error by the Administrative Judge in her decision.

Applicant identifies one brief passage in the hearing transcript and states "[m]ust have tape-recording to correct."[(4)] As the appealing party, Applicant must identify claims of error with specificity. *See, e.g.*, ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3. Because Applicant fails to indicate how this alleged error in the hearing transcript reflects any factual

or legal error by the Administrative Judge or how this alleged error harmed or prejudiced Applicant, this claim of error lacks sufficient specificity to warrant consideration by the Board.[(5)]

As for the remainder of Applicant's claims of errors in the hearing transcript, the Board has reviewed them and concludes the following: (a) with respect to 17 claims of transcript errors[(6)] a review of the decision below persuades the Board that there is no indication that the alleged errors confused or misled the Judge or resulted in any unwarranted finding or conclusion in the Judge's decision; and (b) with respect to 3 other claims of transcript errors[(7)] a review of the decision shows the Administrative Judge made factual findings consistent with Applicant's interpretation of the record evidence and, therefore, any errors in the transcript clearly did not confuse or mislead the Judge.

2. Whether the Administrative Judge erred by applying a memorandum issued by the Assistant Secretary of Defense for Command, Control, Communications and Intelligence. On appeal, Applicant argues: (a) the ASDC3I memorandum was not in existence when he last visited FC and the Administrative Judge erred by applying the ASDC3I memorandum retroactively to his past conduct; (b) his use of an FC passport before the ASDC3I memorandum was issued was consistent with Guideline C; (c) application of the ASDC3I memorandum is unwarranted because the facts and circumstances of his possession and use of an FC passport do not demonstrate he has a preference for FC; and (d) application of the ASDC3I memorandum is not warranted because he does not currently possess an FC passport. These arguments raise the issue of whether the Judge erred by applying the ASDC3I memorandum to Applicant's case.

Under Section 5.1 of the Directive, the ASDC3I has the authority to, *inter alia,* establish adjudicative standards, oversee the application of such standards, and to issue clarifying guidance and instructions. The ASDC3I memo falls within the scope of Section 5.1. *See, e.g.*, ISCR Case No. 99-0481 (November 29, 2000) at p. 5 n.1. Under the Directive, neither a DOHA Administrative Judge nor this Board has the authority or discretion to ignore, disregard, or decline to apply the ASDC3I memo. Indeed, DOHA Administrative Judges and this Board must make decisions "in accordance with policy, procedures, and standards established by [the] Directive." Directive, Section 5.2.14. Accordingly, both DOHA Judges and this Board must apply the ASDC3I memorandum in any case to which it is applicable. *See, e.g.*, ISCR Case No. 01-00783 (December 19, 2001) at pp. 4-5; ISCR Case No. 00-0009 (September 26, 2001) at p. 3.

(a) Application of the ASDC3I memorandum to an applicant's conduct that was undertaken before the issuance of that memorandum does not violate the *Ex Post Facto* Clause or the Due Process Clause of the U.S. Constitution. *See* ISCR Case No. 99-0424 (February 8, 2001) at pp. 7-8 (discussing federal cases). Therefore, the Administrative Judge did not err by applying the ASDC3I memorandum to Applicant's case even though Applicant obtained an FC passport before that memorandum was issued.

(b) Even if the Board were to assume solely for the purposes of deciding this appeal that Applicant's possession and use of an FC passport in the past were consistent with then-existing DoD policy and standards, such an assumption would not lead the Board to conclude the Administrative Judge erred. Applicant's security eligibility at this time must be adjudicated under current DoD policy and standards, not past DoD policy and standards. *See, e.g.*, ISCR Case No. 01-00783 (December 19, 2001) at p. 5.

Applicant's reliance on two State Department documents (Exhibits B and C) does not demonstrate the Administrative Judge erred by applying the ASDC3I memorandum. Exhibit B is a document entitled "Dual Nationality" that appears on the State Department Web site. Although Exhibit B recognizes that some foreign countries require dual nationals to use their passports to enter and leave those countries, nothing in Exhibit B states or indicates that the U.S. government affirmatively authorizes or approves of the use of a foreign passport in those situations. *See* ISCR Case No. 99-0511 (December 19, 2000) at p. 13 (State Department recognition of the existence of a practice by some countries concerning use of foreign passports, without the State Department endorsing or objecting to that practice, does not constitute State Department approval or ratification of the practice). Furthermore, Exhibit C (a State Department Consular Information Sheet on FC) specifically notes that dual nationals may use their U.S. passports to enter and leave FC. Furthermore, nothing in Exhibit C states or indicates that the U.S. government affirmatively authorizes or approves of the use of an FC passport by a dual national. Indeed, as noted by Department Counsel, Applicant conceded at the hearing (Hearing Transcript at p. 145) that he did not receive official U.S. government approval to use an FC passport. Finally, nothing in Executive Order 12968, Executive Order 10865, or the Directive requires that DoD policies, practices, or procedures in security clearance adjudications must follow or be consistent with State Department policies, practices or procedures,

especially ones that on their face do not deal with security clearance adjudications. *See* ISCR Case No. 99-0424 (February 8, 2001) at p. 6.[(8)]

(c) Applicant's argument that he only used the FC passport when he could not use his U.S. passport in FC fails to demonstrate the Administrative Judge erred in applying the ASDC3I memorandum. The Judge specifically noted Applicant's explanation for why he used an FC passport and concluded that the ASDC3I memorandum does not provide for a claim of necessity as extenuation or mitigation of the possession and use of a foreign passport. The Judge's interpretation of the ASDC3I memorandum concerning claims of necessity is legally correct. *See, e.g.*, ISCR Case No. 99-0532 (February 27, 2001) at p. 6 (noting ASDC3I memorandum superseded prior Board rulings on legal necessity); ISCR Case No. 99-0519 (February 23, 2001) at p. 7 (same).

(d) Applicant contends the Administrative Judge should not have applied the ASDC3I memorandum in his case because he currently does not possess an unexpired FC passport.

The following findings by the Administrative Judge are relevant to this appeal issue: (i) Applicant is an FC citizen by birth and a U.S. citizen by naturalization; (ii) Applicant does not wish to renounce his FC citizenship; (iii) Applicant has relied on an FC passport as a form of identification when visiting FC; (iv) Applicant renewed the FC passport in 1997 when he was visiting FC; (v) Applicant foresees the possibility that he would have to travel to FC on an emergency or urgent basis to fulfill family obligations; (vi) Applicant now indicates that he would make no effort to locate his missing FC passport; (vii) Applicant would like to be able to use an FC passport as identification when he is traveling in FC; (viii) Applicant would relinquish his FC passport only if ordered to do so to get a security clearance; and (ix) although Applicant does not presently have physical possession of his FC passport, he may find it and can ask FC authorities for a replacement passport.

Considering the record as a whole (including the evidence that Applicant is reluctant to forego the use of an FC passport for identification when he travels to FC, the evidence that Applicant has immediate family in FC that he probably will visit in the future, and the evidence that Applicant has given somewhat vague and inconsistent explanations about the location of his FC passport) it was not arbitrary or capricious for the Administrative Judge to conclude that Applicant had failed to show that he had surrendered his FC passport within the meaning of the ASDC3I memorandum. Applicant had the burden of presenting persuasive evidence to demonstrate that he satisfied the terms of the ASDC3I memorandum sufficiently to warrant a favorable security clearance decision. *See* Directive, Additional Procedural Guidance, Item E3.1.15. Because the record evidence shows Applicant is somewhat equivocal in his intentions concerning the possession and use of an FC passport,[(9)] the Judge had a rational basis to conclude Applicant failed to demonstrate extenuation or mitigation under the terms of the ASDC3I memorandum.

3. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Applicant makes several additional arguments, which the Board construe as raising the issue of whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. Specifically, Applicant argues: (a) the Judge disregarded record evidence favorable to him; (b) the Judge erred in her application of pertinent provisions of the Adjudicative Guidelines; (c) his possession and use of an FC passport, in and of itself, has no bearing on any duties or obligations he may owe to FC; (d) the Judge ignored the fact that FC is friendly toward the United States; (e) the Judge erred by concluding his involvement in a business venture (SOR paragraph 1.c.) warranted an adverse formal finding under Guideline C; (f) the Judge failed to apply the whole person concept to his case; and (g) the Judge should have accepted Applicant's willingness to relinquish his FC passport as sufficient to satisfy the terms of the ASDC3I memorandum. The Board will address these arguments in turn.

(a) Applicant argues the Administrative Judge's adverse decision shows that the Judge ignored favorable record evidence such as Applicant's history, the favorable oral and written statements made by Applicant's colleagues, and Applicant's contributions to the defense industry. The Board does not find this argument persuasive.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically stated otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Applicant's ability to cite to favorable record evidence is not sufficient to rebut or overcome that presumption. A Judge is not compelled to give controlling or decisive weight to favorable evidence submitted by an applicant. Rather, a Judge must consider and weigh

all the record evidence, both favorable and unfavorable. *See* Directive, Section 6.3; E2.2.1. Merely because a Judge concludes that favorable evidence presented by an applicant is not sufficient to outweigh or overcome the unfavorable evidence, such a conclusion does not demonstrate the Judge ignored or disregarded the favorable evidence.

(b) Applicant also argues the Administrative Judge should have applied Foreign Preference Mitigating Condition 1, and Foreign Influence itigating Condition 1. The Board will address these arguments in turn.

Applicant argues the Administrative Judge should have applied Foreign Preference Mitigating Condition 1[(10)] because his dual citizenship is based solely on his birth in FC and the status of his mother as an FC citizen, and because he "has not participated in actions rising to the level of exercise of dual citizenship."[(11)] This argument fails to show the Judge erred. A reading of the decision below shows the Judge specifically noted the applicability of Foreign Preference Mitigating Condition 1 to Applicant's case. Although a Judge must apply pertinent provisions of the Adjudicative Guidelines, the mere applicability of an Adjudicative Guideline mitigating condition does not compel a Judge to make a favorable security clearance decision. Rather, the Judge must consider and weigh an applicable Adjudicative Guideline mitigating condition in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 00-0104 (March 21, 2001) at p. 10; ISCR Case No. 99-0295 (October 20, 2000) at p. 5. In this case, the application of Foreign Preference Mitigating Condition 1 did not preclude the Judge from considering the record evidence that indicated Applicant had engaged in conduct indicative of a foreign preference (*i.e.*, possessed and used an FC passport after becoming a naturalized U.S. citizen, and made efforts to commence a business venture in FC involving FC government officials), as well as evidence of vulnerability to possible foreign influence due to Applicant's family ties in FC.

Applicant argues the Administrative Judge should have applied Foreign Influence Mitigating Condition 1[(12)] because his immediate family members living in FC are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force him to choose between the persons involved or the United States. Applicant's argument fails to demonstrate the Judge erred.

The Administrative Judge correctly noted that Applicant has the burden of presenting evidence to rebut the government's evidence against him, or to extenuate or mitigate the security concerns raised by the presence of his immediate family members in FC. *See* Directive, Additional Procedural Guidance, Item E3.1.15. *See also* ISCR Case No. 00-0737 (September 7, 2001) at p. 5 ("Furthermore, the Judge properly noted that Applicant had the burden of demonstrating that his family ties [in a foreign country] did not place him in a position of vulnerability through possible foreign influence."); ISCR Case No. 99-0424 (February 8, 2001) at pp. 11-12 (possession of family ties in a foreign country raises a security concern "sufficient to require an applicant to present evidence of rebuttal, extenuation or mitigation sufficient to meet applicant's burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for the applicant."). In the decision below, the Judge explained why the facts and circumstances of Applicant's immediate family members in FC raised security concerns and why she concluded the evidence presented by Applicant was not sufficient to dispel those security concerns. The Judge's analysis of this aspect of this case reflects a reasonable interpretation of the record evidence and does not involve any arbitrary or capricious reasoning. Accordingly, it was not arbitrary, capricious, or contrary to law for the Judge to refrain from applying Foreign Influence Mitigating Condition 1 in Applicant's case.

(c) The Board does not disagree with Applicant's argument that his possession and use of an FC passport, in and of itself, does not demonstrate he owes any duties or obligations toward FC. However, Applicant's argument on this point is flawed. There is no dispute that Applicant is a dual national who is an FC citizen by birth and a naturalized U.S. citizen, and there is no dispute that FC considers Applicant to be an FC citizen. Whatever duties or obligations that Applicant may have with respect to FC arise under FC law (particularly when he is physically in FC),[(13)] not through his possession or use of an FC passport. Furthermore, by applying for and renewing an FC passport, Applicant has exercised the rights and privileges of an FC citizen,[(14)] and whenever Applicant travels to FC he places himself in a position where FC officials could impose on him the duties or obligations owed by FC citizens.[(15)] Accordingly, Applicant's argument about the significance of his FC passport fails to demonstrate the Administrative Judge erred.

(d) There is no record evidence on whether FC is a country that has friendly relations with the United States.[(16)] Furthermore, it is not clear whether the nature of foreign relations between the United States and specific foreign

countries is a proper subject for administrative notice. However, even if the Board were to assume, solely for purposes of deciding this appeal, that FC has friendly relations with the United States, such an assumption would not persuade us that Applicant has demonstrated the Administrative Judge erred. Neither Guideline B (Foreign Influence) nor Guideline C (Foreign Preference) is limited to foreign countries that do not have friendly relations with, or are hostile to, the United States. Furthermore, nothing in the ASDC3I memorandum indicates or suggests that possession and use of a foreign passport will be viewed differently if it has been issued by a foreign country that has friendly relations with the United States. Accordingly, Applicant's argument concerning the nature of United States-FC relations fails to demonstrate the Judge erred.

(e) The Administrative Judge concluded that the facts and circumstances under which Applicant worked as a non-paid consultant for the FC geological survey agency in September 1997 raised security concerns under Guideline C (Foreign Preference) because there was no showing that Applicant's efforts were sponsored by the U.S. government or that his proposed projects were consistent with U.S. interests. On appeal, Applicant concedes that his actions were not sponsored by the U.S. Government, but argues: (i) his actions were consistent with U.S. interests because they were undertaken with an eye toward exploring the possibility of undertaking a project in FC that might receive funding under a joint U.S.-FC initiative; and (ii) in any event, the matter should be considered "null and void since the project never came to fruition."

The Administrative Judge's findings and conclusions about the events covered by SOR paragraph 1.c. reflect a reasonable interpretation of the record evidence. Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to persuade the Board that the Administrative Judge's findings and conclusions concerning SOR paragraph 1.c. are arbitrary, capricious, or contrary to law. To the extent that Applicant's argument can be construed as urging application of Foreign Preference Mitigating Condition 3,[(17)] it fails to demonstrate the Judge erred. Application of that mitigating condition would require "record evidence that an applicant's conduct is specifically approved, authorized, consented to, or otherwise sanctioned by the federal government," ISCR Case No. 99-0511 (December 19, 2000) at p. 7, and there is no such record evidence in this case.

(f) Applicant also contends the Administrative Judge failed to apply the whole person concept in his case, and argues that application of that concept would have resulted in a favorable security clearance decision. In making a security clearance determination, an Administrative Judge must consider the record evidence as a whole and evaluate the applicant's security eligibility under the whole person concept. *See* Directive, Section 6.3; E2.2.1; E2.2.3; E2.2.4. Considering the record as a whole, the Board concludes the Judge's findings and conclusions reflect an analysis of Applicant's case that is consistent with the whole person concept. Applicant's argument to the contrary is not persuasive.

(g) Given the specific facts highlighted above, Applicant's argument about his expressed willingness to relinquish his FC passport fails to demonstrate the Administrative Judge erred by concluding Applicant had failed to meet the requirements laid out in the ASDC3I memorandum. The ASDC3I memorandum refers to the surrender of a foreign passport by an applicant, not merely a statement by the applicant that he or she is willing to surrender a foreign passport.

Applicant also avers that the Administrative Judge interpreted his explanations for having an FC passport prior to issuance of the ASDC3I memorandum as a reluctance to comply with that memorandum. The Board finds no support for Applicant's argument in the text of the Judge's decision.

Conclusion

Applicant has failed to demonstrate 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. In the appeal brief, Applicant did not number the list of specific errors he claims exist in the hearing transcript. For purposes of resolving this appeal, the Board will refer to those errors as alleged errors 1 through 40, by assigning them numbers in the order in which they are listed in Applicant's appeal brief.

2. Alleged errors 3, 8, 9, 10, 11, 13, 15, 20, 26, 33, 36, and 38.

3. Alleged errors 4, 5, 6, 21, 22, 25, and 39.

4. Alleged error 7.

5. The Board notes that, in contrast, Applicant sets forth with varying degrees of specificity arguments about how various other alleged errors were harmful or prejudicial to his case.

6. Alleged errors 1, 2, 12, 14, 16, 17, 18, 19, 23, 24, 27, 28, 29, 31, 34, 35, and 40.

7. Alleged errors 30, 32, and 37.

8. To the extent that State Department documents indicate that certain conduct may not place a person's U.S. citizenship in jeopardy, such statements are not relevant to adjudicating an applicant's security eligibility. Under the Directive, there are many types of conduct by an applicant that can raise security concerns without placing the applicant's U.S. citizenship in jeopardy. The federal government is not required to grant or continue a security clearance merely because an applicant's conduct does not fall in the limited category of conduct that could jeopardize the applicant's U.S. citizenship. For a discussion of the law about the effect of expatriating acts on a person's U.S. citizenship, *see Vance v. Terrazas*, 444 U.S. 252 (1980).

9. An Administrative Judge must consider whether an applicant is likely to continue or repeat conduct that has negative security significance. *See* Directive, Section 6.3.6; E2.2.9.

10. "Dual citizenship is based solely on parents' citizenship or birth in a foreign country."

11. Applicant asserts that he has not voted in an FC election or received educational or financial benefits from FC since he became a naturalized U.S. citizen. Indeed, the Administrative Judge made such a finding in the decision below. However, that finding does not negate the significance of Applicant's conduct in obtaining and using an FC passport.

12. "A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States."

13. *See* Exhibits A and B.

14. *See, e.g.*, ISCR Case No. 99-0597 (December 13, 2000) at p. 9 ("Obtaining a foreign country passport is an act of exercising the rights or privileges of a citizen of that foreign country.").

15. *See* Exhibits A and B.

16. Evidence that the United States undertook a specific joint initiative with FC in the past is not sufficient to establish whether current United States-FC relations in general are friendly or otherwise.

17. "Activity is sanctioned by the United States."