

DATE: December 19, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-00783

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Elizabeth M. Matchinski issued a decision, dated September 26, 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 the Administrative Judge made some errors in her findings of fact; and (2) whether the Administrative Judge's 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 June 6, 2001. The SOR was based on Guideline C (Foreign Preference). Applicant submitted an answer to the SOR, in which he stated "I wish to have a decision without a hearing." A File of Relevant Material (FORM) was prepared, a copy of the FORM was given to Applicant, and Applicant submitted a response to the FORM. The case was then assigned to the Administrative Judge for determination.

The Administrative Judge issued a written decision, dated September 26, 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.

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

Applicant was born in a foreign country (FC) in 1936. Applicant was raised and educated in FC. Applicant obtained an FC passport in 1951, and served in the FC military for two years after he got a university degree in FC.

Applicant married an FC citizen and had two daughters born outside the United States during the early 1960s.

Applicant was recruited by a United States defense contractor while he was living in FC, and moved to the United States with his family in 1967. Applicant had a son born in the United States after he moved here.

Applicant became a naturalized U.S. citizen in December 1972. Applicant took no action to formally relinquish his FC citizenship at that time, electing to maintain his FC citizenship for reasons of convenience and possible future retirement in FC.

Applicant divorced his spouse in 1976. In 1986, Applicant married a woman who is a naturalized U.S. citizen. Applicant has five stepchildren as a result of his second marriage. All the stepchildren are U.S. citizens.

In December 1992, Applicant's FC passport was renewed, and it is scheduled to expire in December 2002. Applicant was issued a U.S. passport in March 1994. The record is not clear whether the U.S. passport was issued for the first time or was a renewal of an earlier U.S. passport. Since obtaining a U.S. passport, Applicant has used it exclusively for traveling abroad, including during a trip to FC in 1998.

Over the years, Applicant has paid into FC's national insurance program, and he expects to receive about \$500 a month from FC on his retirement, which is less than the \$1,100 a month he expects to receive in U.S. social security benefits. Applicant owns no realty in FC. Applicant has mortgage obligations in the United States for his residence and two rental properties. As of April 1999, Applicant realized \$1,900 a month in rental income.

Applicant completed a security clearance application in January 1999. In the application, Applicant disclosed his dual citizenship and his possession of an FC passport, and indicated he maintained the FC passport "TO PERMIT EXTENDED STAY AFTER RETIREMENT IN [FC]."

Applicant was interviewed in April 1999 and gave a written statement, in which he indicated the following: (a) he maintained dual citizenship "for the purpose of convenience and possible future retirement"; (b) his allegiance is to the United States; (c) he expressed a willingness to renounce his FC citizenship if necessary; (d) he possesses an FC passport, but has not used it when traveling outside the United States, including trips to FC; and (e) he has not voted in FC and has not sought political office there.

With the SOR, Applicant was apprized of an August 16, 2000 memorandum by the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASDC3I). According to the ASDC3I memorandum, if an applicant possesses a foreign passport, security clearance should be denied or revoked unless the applicant surrenders the foreign passport or obtains approval for its use by an appropriate agency of the U.S. government.

When responding to the SOR, Applicant admitted holding an FC passport (last renewed in 1992), indicated he had not used it, and explained that possession of the FC passport could permit unrestricted residence in FC for his employer's

business or for U.S. government purposes.

When responding to the FORM, Applicant maintained that he has not exercised dual citizenship since he last renewed his FC passport in 1992, indicated that he no longer was interested in retiring in FC because all of his next of kin there are now deceased, and cited his registration for military service in the United States in 1968 as confirmation of his allegiance to the United States.

As of September 2001, Applicant had not taken any effort to surrender his FC passport or to obtain official approval for its retention.

For the reasons set forth in the ASDC3I memorandum, Applicant's continued possession of the FC passport requires an adverse security clearance decision.

Appeal Issues

1. Whether the Administrative Judge made some errors in her findings of fact. On appeal, Applicant refers to footnotes 3, 4 and 5 of the Administrative Judge's decision and asserts: (a) the date his daughter became a naturalized U.S. citizen was incorrectly listed on his security clearance application due to a typographical error; and (b) his U.S. passport was reissued in March 1994 as a result of renewal and used to reenter the United States. The Board construes these statements as challenging the Judge's factual findings in those footnotes.

Applicant's statements on appeal are based on factual assertions that constitute new evidence, which the Board cannot consider. Directive, Additional Procedural Guidance, Item E3.1.29. The Administrative Judge's findings in footnotes 3, 4, and 5 of her decision reflect a reasonable interpretation of the record evidence below. Even if the Board were to assume solely for purposes of deciding this appeal that the Judge's challenged findings were in error, the challenged findings were not central or dispositive to her adverse conclusions under Guideline C or her overall adverse security clearance decision.

2. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. On appeal, Applicant states: (a) that although he is an FC citizen by birth, he is "subject to an exclusive oath of allegiance to the United States"; (b) footnote 9 of the decision refers to the ASDC3I memorandum and indicates possession and/or use of a foreign passport may be a disqualifying condition (emphasis in Applicant's brief); (c) he has not used the FC passport for any purpose and it expires in 2002; (d) he entered the United States with an FC passport and a U.S. immigration visa in 1967; and (e) he was granted a secret clearance in February 1968 as a green card holder. The Board construes Applicant's statements as raising the issue of whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board concludes Applicant's appeal statements fail to show the Judge's decision is arbitrary, capricious, or contrary to law.

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.

The ASDC3I memorandum makes clear that it is Department of Defense (DoD) policy that possession and use of a foreign passport are security disqualifying and can be mitigated only if "the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government." Given the record evidence that Applicant possesses a current FC passport, the Judge properly concluded that the ASDC3I memorandum mandated an adverse security clearance decision.

Whatever DoD policy or standards may have been in effect when Applicant was granted a security clearance in February 1968, Applicant's security eligibility must be adjudicated under current DoD policy and standards. Because the ASDC3I memorandum covers the facts and circumstances of Applicant's case, the Administrative Judge acted properly by applying it when adjudicating Applicant's security eligibility.

Conclusion

Applicant has failed to demonstrate the Administrative Judge erred. Therefore, the Board affirms the 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