

DATE: August 29, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-02270

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Applicant has appealed the April 15, 2003 decision of Administrative Judge Kathryn Moen Braeman, in which the Judge concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

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 issue: whether the Administrative Judge erred by concluding that Applicant indicated a preference for a foreign country (Austria). For the reasons that follow, the Board sustains the conclusions of the Administrative Judge.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated October 10, 2002. The SOR was based on Guideline B (Foreign Influence) and Guideline C (Foreign Preference).

Applicant submitted an answer to the SOR and requested a hearing. A hearing was held on January 28, 2003. The Judge issued a security clearance decision on April 15, 2003. In that decision the Judge made formal findings in favor of Applicant regarding the allegations under Guideline B. Those findings are not at issue on appeal. The Judge made formal findings adverse to Applicant under seven out of eight allegations under Guideline C and concluded overall that it was not clearly consistent with the national interest to grant or continue Applicant's security clearance. The case is before the Board on Applicant's appeal from that 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 also 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 the same record. 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).

Appeal Issue

Applicant has made assertions in his appeal brief and included submissions attached to the brief that constitute new evidence. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29.

Whether the Administrative Judge erred by concluding that Applicant indicated a preference for foreign country (Austria). Applicant asserts that the Administrative Judge erred in making her foreign preference determination and specifically argues the following: (1) contrary to the Judge's findings, Applicant has not exercised his Austrian citizenship since moving to the United States in 1994; (2) the Judge erred by concluding that Applicant's surrender of his Austrian passport was not sufficient to mitigate a finding of foreign preference; (3) the Judge's reliance on Applicant's use of his Austrian passport in 1989 when he was a minor as a basis for finding foreign preference was error; (4) the Judge's reliance on Applicant's service in the Austrian military and his acceptance of medical and educational benefits from Austria as a basis for finding foreign preference was error; and (5) the Judge's reliance on Applicant's intention not to relinquish his Austrian citizenship as a basis for finding foreign preference was error.

(1) Applicant, who was born in Austria in 1975 and resided there until 1994 but was granted United States citizenship by virtue of his mother's U.S. citizenship, asserts that he has not exercised his Austrian citizenship since moving to the United States in 1994 except for holding his Austrian passport. He therefore claims that there is no basis for denying his security clearance based on exercise of dual citizenship. Applicant's argument lacks merit. The one exception conceded by Applicant - the holding of an Austrian passport - is itself an exercise of the rights and privileges of Austrian citizenship. In addition, the Administrative Judge found that Applicant renewed his Austrian passport in July 2000 and used his Austrian passport to the exclusion of his U.S. passport when traveling to certain European countries. These findings are supported by the record evidence and provide an adequate basis for the Judge's conclusion that Applicant has engaged in active exercise of Austrian citizenship even after moving to the United States in 1994.

(2) The record evidence in this case shows that Applicant mailed his Austrian passport to the Austrian Consulate on the morning of his January 28, 2003 hearing. The Judge concluded that his surrender of the passport was too recent to be of significant value in mitigation. Applicant asserts on appeal that the "Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of Foreign Preference Adjudicative Guideline" of August 16, 2000 (otherwise referred to as the "ASDC3I Memo")⁽¹⁾ does not state when the surrender of the passport must occur. He argues that the timing of his surrender of the passport does not provide a valid basis for a finding of foreign preference. This argument lacks merit. While the Judge was required to consider the mailing of the passport in determining whether such act took the case out of the realm of the automatic adverse consequences of the ASDC3I Memo, the Judge could also consider the circumstances surrounding the surrender of the passport when determining whether the action was mitigating of a foreign preference under Guideline C. In this case the Judge viewed the nature and timing of the passport surrender in the context of the other evidence in the record and concluded that the action was insufficient to establish a clear preference for the United States. Her resolution of this issue is sustainable.

(3) Applicant argues on appeal that his use of his Austrian passport in 1989 to travel to Eastern Europe was done at a time when he was 14 years old and under the control of his parents who made the decision as to what passports to use. He asserts that the Judge erroneously considered his use of the Austrian passport as a minor when resolving the issue of foreign preference. A review of the Judge's decision reveals that she considered Applicant's overall use of his Austrian

passport and did not distinguish between his use as a minor (which would include use in 1989) when he was under the direction and control of his parents and his use as an adult (which would include use after Applicant moved to the United States in 1994). The Judge's failure to distinguish between these scenarios was error. An applicant cannot be said to have exercised a foreign preference through passport use as a matter of free will while a minor under the dominion and control of his parents. *See* ISCR Case No. 98-0331 (May 26, 1999) at p. 7 n.6 (noting actions of parents should not be attributed to minors who are under their control).

(4) Applicant asserts that the Judge's reliance on Applicant's service in the Austrian military and his receipt of educational benefits from the Austrian government as a basis for finding foreign preference was error. He states that prior Austrian military service is not a reason for a denial of a security clearance *per se*. He also notes that these circumstances existed in Austria prior to 1994 and that the concern held by the Department of Defense is for individuals *currently* receiving free medical care or education benefits from a foreign country (emphasis is in Applicant's appeal brief). He emphasizes that he has not received benefits from the Austrian government since his move to the United States (although the evidence establishes that he could be recalled by the Austrian military in the event of a war).

Nothing in the Administrative Judge's decision indicates that she considered Applicant's prior service in the Austrian military to be a *per se* bar to his receiving a security clearance. It was a factor that she properly considered when evaluating the totality of the record evidence in the case. Regarding the receipt of educational benefits, the language of the disqualifying condition in the Directive does not require a finding that the receipt of such benefits be current. While the passage of time since Applicant was on active duty in the Austrian military and received educational benefits arguably lessens the impact of these factors upon a foreign preference determination, the Administrative Judge still could consider them along with all the other evidence in the case in reaching her findings and conclusions. Excluding actions undertaken while he was a minor that were essentially beyond his control, Applicant's entire history of connections with Austria is relevant to his security clearance determination under the "whole person" concept. Applicant has failed to demonstrate error on the part of the Administrative Judge.

(5) Applicant asserts on appeal that his intention not to relinquish his Austrian citizenship is not one of the issues that could raise a security concern under Guideline C. He argues that there is no ban placed on granting security clearances to persons holding dual citizenship. He argues that the Administrative Judge's reliance on this circumstance is, therefore, not consistent with current policy.

In her decision the Administrative Judge stated her understanding that, in the context of granting security clearances, the maintenance of dual citizenship was not prohibited *per se*. A reading of the Judge's decision as a whole convinces the Board that the Judge did not treat Applicant's maintenance of dual citizenship as a *per se* bar to his receipt of a security clearance. Contrary to the assertions of Applicant, the Judge could properly consider Applicant's intention to maintain his dual citizenship along with all the other evidence in the case in reaching a security clearance determination.

Regarding the dual citizenship issue, one aspect of the Judge's decision is problematic. At one point the Judge states, "Further, [Applicant] took no action to comply with [Mitigating Condition] 4⁽²⁾ as he did not express any willingness to renounce his dual citizenship." Failure to satisfy a mitigating condition may be taken into consideration by a Judge when assessing an applicant's claim of extenuation, mitigation, or changed circumstances. However, failure to take affirmative steps to comply with a mitigating condition cannot be used to turn the mitigating condition into a disqualifying condition. *See, e.g.,* ISCR Case No. 01-22606 (June 30, 2003) at p. 6. To the extent the Judge relied upon Applicant's noncompliance with Mitigating Condition 4, such reliance was error.

As errors have been identified in the decision of the Administrative Judge, the Board must now evaluate those errors in light of the entire decision and the whole of the record evidence. Upon such review the Board concludes the errors are harmless given the overall context of the decision and the record, as there is sufficient evidence to sustain those conclusions of the Administrative Judge that are correct.

Conclusion

Applicant has failed to identify error on the part of the Administrative Judge that warrants remand or reversal. Accordingly, the Board sustains the Judge's April 15, 2003 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 ASDC3I Memo provides that "any clearance [must] be denied or revoked unless the applicant surrenders the foreign passport. . . ."

2. "Individual has expressed a willingness to renounce dual citizenship."