

DATE: July 15, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-04826

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Wilford H. Ross issued a decision, dated January 25, 2002, 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 following issues: (1) whether the Administrative Judge erred when making certain findings about the physical nature of Applicant's foreign country (hereinafter designated FC) passport; (2) whether the Administrative Judge erred by finding that Applicant had not surrendered his FC passport; and (3) whether the Administrative Judge erred by concluding the government's security concerns regarding Applicant's susceptibility to foreign influence were not mitigated.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated August 16, 2001 to Applicant. The SOR was based on Guideline C (Foreign Preference), Guideline B (Foreign Influence), and Guideline E (Personal Conduct). [\(1\)](#) Applicant declined a hearing and elected to have the case decided on the basis of the administrative record. The government issued a File of Relevant Material (FORM) containing the documentary record against Applicant on October 3, 2001. The Applicant submitted a response to the FORM on November 2, 2001. The Administrative Judge issued a written decision, dated January 25, 2002, in which he concluded it is not 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).

Appeal Issues

1. Whether the Administrative Judge erred when making certain findings about the physical nature of Applicant's FC passport. There is no dispute on appeal that Applicant had an FC passport issued to him in 1996. Regarding the FC passport, the Administrative Judge made the following findings of fact: "The first two pages of Applicant's allegedly voided FC1 passport is found at page 3 of Government Exhibit 3. It is in FC1 language and no translation into English was provided by the Applicant. There is no evidence that the Applicant has surrendered the passport as required by the Memorandum of the Assistant Secretary of Defense (Command, Control, Communication and Intelligence), dated August 16, 2000, 'Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Applicant [sic] of the Foreign Preference Adjudicative Guideline.' ([ASDC3I] Memorandum')." In the Conclusions section of his Decision, the Administrative Judge stated "The Applicant alleges that his FC1 passport has been stamped 'Void' by the FC1 consulate. He submitted a photocopy of the passport which allegedly shows this. However, the passport is in the FC1 language and there is no translation. Accordingly, I cannot find the Applicant's allegation that the passport has been stamped 'Void' to be true. There is no other evidence that the Applicant turned his passport over to the FC1 authorities or has otherwise terminated possession of it. Under the particular circumstances of this case, I cannot find that the Applicant has 'surrendered' his passport as required by the [ASDC3I] Memorandum."

Applicant asserts on appeal that the physical characteristics of his FC passport are not as the Judge represents. He points out that on one page of the passport, each item header is worded both in the FC language and in English. He also notes the letters "VOID" appear on one page of the photocopy of the FC passport. Applicant's assertions regarding the passport pages are correct. The Board notes that both passport pages contain headings or passages in English and that the word "VOID" is legible on one page. However, given the limited evidentiary value of a photocopy of two pages of the FC passport, the Board declines to conclude that, as a matter of law, the Judge had to find Applicant's FC passport was voided.

2. Whether the Administrative Judge erred by finding that the Applicant had not surrendered his FC passport. Applicant asserts that his passport is voided and therefore cannot be used. He states that the voided passport satisfies Guideline C's "use of passport" clause ⁽²⁾ and further states that he surrendered the passport as required by the ASDC3I memorandum by rendering the passport ineffective. Applicant goes on to say that he has satisfied Guideline C's "possession of passport" clause by submitting it to the Office of the Consulate General of FC on March 4, 2002.

Applicant's statement describing his actions in submitting his FC passport to the Consulate General of FC was not before the Administrative Judge. Indeed, Applicant's statement refers to matters that purportedly happened more than a month after the Judge issued his decision. Therefore, it constitutes new evidence, which cannot be considered on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29 ("No new evidence shall be received or considered by the Appeal Board."). Thus, the Board is only required to consider Applicant's argument that action rendering the passport "ineffective" (i.e., the physical voiding of the passport) equates to a surrender of the passport.

As discussed earlier in this decision, the Board declines to conclude, as a matter of law, that the Administrative Judge had to find Applicant's FC passport was voided. Therefore, the Board need not decide at this time whether the voiding

of a foreign passport constitutes "surrender" under the ASDC3I Memorandum.

3. Whether the Administrative Judge erred by concluding the government's security concerns regarding Applicant's susceptibility to foreign influence were not mitigated. Regarding foreign influence, the Administrative Judge made the following findings of fact: "...Applicant's mother became an American citizen on February 27, 2001. The Applicant's father and brother remain citizens of FC1. Both of them reside in the United States and have resided here since 1979. The Applicant's paternal grandparents are citizens of FC1 and continue to reside there." The Administrative Judge concluded "Under the particular circumstances of this case, [Applicant] has not mitigated the concerns of Paragraph 2 of the SOR, except with regard to his mother."⁽³⁾

In addition to the basic findings of the Administrative Judge, which are uncontested, the record below includes several assertions by Applicant on the subject of his relatives and foreign influence. He states that his father has expressed no desire or intention of applying for United States citizenship and that the family immigrated from FC because his father wished to own his own business as an insurance agent. Applicant states that none of his immediate family members or extended family members are employed by any government agency or entity and neither he nor any of his family members have ever been employed by, or trained by an intelligence agency. Applicant maintains he has no close ongoing personal relationships with anyone in FC "notwithstanding my grandparents who live there." Applicant indicated that he did not provide any financial assistance to his relatives living in FC. He denied that his immediate family would influence him "to compromise sensitive and classified information of the US."

On appeal, Applicant claims that the government concerns regarding foreign influence have been mitigated. In doing so, he offers a more detailed description of the background of his family members and their current circumstances than exists in the record below. As noted earlier, the Board cannot consider new evidence on appeal. Applicant argues essentially that neither his father, his brother nor his grandparents are agents of FC or in any position to be exploited by FC in a way that could force Applicant to choose between loyalty to them and the United States.

There is no presumption of error below and the appealing party has the burden of demonstrating the Administrative Judge committed factual or legal error. Given the limited nature of the record evidence below and the limits of the Board's reviewing authority, the Board concludes Applicant's appeal arguments fall short of demonstrating the Judge erred. Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate error by the Administrative Judge.

Conclusion

Applicant has failed to meet his burden of demonstrating error 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 SOR allegations brought under Guideline E were concluded favorably to Applicant. Since Department Counsel has not filed a cross-appeal in this case, the Administrative Judge's findings and conclusions under Guideline E are not a part of this appeal.
2. Disqualifying Condition 2 of Guideline C refers to "Possession and/or use of a foreign passport."
3. Paragraph 2 of the SOR lists as specific disqualifying factors, "a. Your mother, father and brother are a [sic] citizens of [FC]." and "b. Your grandparents are citizens and reside in [FC]."