

DATE: August 26, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-11192

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

*Pro Se*

Administrative Judge Darlene Lokey Anderson issued a decision, dated February 8, 2002, in which she concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed.

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 certain factual findings by the Administrative Judge are erroneous; and (2) whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

### **Procedural History**

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated September 28, 2001. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence). A hearing was held on January 16, 2002. The Administrative Judge issued a written decision, dated February 8, 2002, 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 1). Applicant came to the United States in 1976 to attend college. Applicant became a permanent resident in 1985 and a naturalized U.S. citizen in May 1991.

Applicant's mother and two of his sisters are citizens of FC 1. Applicant's sisters who reside in FC 1 have applied to come to the United States. Applicant's mother recently moved to the United States and is a permanent resident here. The residence of Applicant's mother in FC 1 is currently for sale. Applicant also has a sister and brother who are naturalized U.S. citizens who live in this country. Applicant's father died in 1999.

Applicant usually contacts his sisters in FC 1 on that country's New Year and on Christmas. Applicant states he maintains a close relationship with his family.

Applicant maintains a close relationship with a friend who is a citizen of a foreign country (FC 2) and is employed by an institute in another foreign country (FC 3). Since 1985, Applicant has maintained regular contact with this friend and has consulted with him on technical issues. Applicant was the best man for his friend's wedding in 2000. Applicant's friend comes to the United States very often, and they get together for dinner and discuss commercial projects on those occasions.

In August 1999, Applicant accompanied his mother on a trip to a foreign country (FC 4) to help her obtain permanent resident status in the United States through the U.S. embassy in FC 4. Applicant used his FC 1 passport (not his U.S. passport) to enter FC 4 to avoid having his mother wait in line because she was ill and there were no wheelchairs for her. Applicant used his U.S. passport to leave FC 4.

Applicant inherited an interest in property owned by his father in FC 1. Under FC 1 law, Applicant needed to have an FC 1 passport in order to give his mother power of attorney to sell the property in FC 1. In October 1999, Applicant renewed his FC 1 passport so that he could give his mother power of attorney to sell property in FC 1.

Applicant possesses an FC 1 passport, which will expire in September 2004. Applicant claims that he returned his FC 1 passport after receiving a copy of the August 16, 2000 memorandum by the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASDC3I) concerning the possession and use of foreign passports. Applicant has given differing accounts of how he returned his FC 1 passport.

Applicant claims his FC 1 passport was sent to a foreign embassy that represents the interests of FC 1 in the United States. Applicant submitted a copy of a certified mail receipt that indicates he mailed something in December 2001 to the foreign embassy in Washington, D.C., but there is no record evidence that indicates what the item was or whether it was delivered or received by the foreign embassy.

Applicant testified that he last traveled to FC 1 in 1976, and that he would arrange to visit his parents outside FC 1 over the years since then. However, a witness for Applicant testified that Applicant told him that Applicant had traveled to FC 1 about three months after Applicant's father died in 1999 in order to settle the affairs of Applicant's father. The testimony of Applicant's witness about Applicant's trip to FC 1 raises questions about Applicant's credibility.

Applicant has received acknowledgments for his professional work for the U.S. military and other parts of the federal government, including letters of commendation from Members of Congress and the Chief of Staff.

The Administrative Judge concluded: (1) Applicant's use of an FC 1 passport after he became a naturalized U.S. citizen

indicates he has not demonstrated an unequivocal preference for the United States; (2) there is no record evidence that Applicant's FC 1 passport was returned to, or received by, the foreign embassy; (3) Applicant is not in compliance with the ASDC3I memorandum concerning the possession and use of foreign passports; (4) Applicant's family ties with citizens of FC 1 and his friendship with a citizen of FC 2 raise security concerns; (5) Applicant has not met his burden of showing that his family ties and his friendship do not place him in a position of vulnerability to foreign influence; (6) Applicant has not demonstrated mitigation under Guideline B or Guideline C; and (7) it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

### Appeal Issues

Applicant's appeal brief contains various statements about his case that go beyond the record evidence below. Such statements constitute new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Applicant's brief also lists the names of several references, along with their e-mail, telephone, or fax numbers. Because the appeal process is limited to consideration of the record evidence developed in the proceedings below (*see* Directive, Additional Procedural Guidance, Item E3.1.29 and E3.1.32.1), the Board cannot and will not contact any of the persons listed as references in Applicant's brief.

Applicant's appeal brief states that a copy of a certified mail receipt is enclosed to support his contention that his FC 1 passport was returned to the foreign embassy representing FC 1's interests in the United States. No copy of the receipt was enclosed with Applicant's appeal brief. Even if a copy of such a receipt were submitted to the Board, it would constitute new evidence that could not be considered on appeal.

1. Whether certain factual findings by the Administrative Judge are erroneous. On appeal, Applicant argues: (a) he has never traveled to FC 1 since the summer of 1976; (b) his 1999 trip involved travel to FC 4, not FC 1; (c) the testimony of Applicant's witness that Applicant traveled to FC 1 in 1999 was incorrect and was due to the fact the witness "was uninformed about the details of the trip" and was "confused and incorrect on the details of the trip"; (d) Applicant's mother renewed his FC 1 passport to facilitate traveling to FC 4; (e) Applicant used his FC 1 passport to enter FC 4 because his mother was sick with cancer and using the FC 1 passport enabled him to get her through FC 4 customs quickly; and (f) he had his sister return his FC 1 passport to the FC 1 interests section of a foreign embassy immediately after he received a copy of the ASDC3I memorandum.

The Board construes Applicant's arguments as challenging the Administrative Judge's findings that: (i) Applicant renewed his FC 1 passport in 1999; (ii) the testimony of Applicant's witness that Applicant traveled to FC 1 in 1999 contradicted Applicant's testimony and undercut his credibility; (iii) Applicant used his FC 1 passport for his personal convenience; and (iv) Applicant did not present sufficient evidence to show that his FC 1 passport was returned.

(i) There is sufficient record evidence to support the Administrative Judge's finding that Applicant renewed his FC 1 passport in 1999. The fact that Applicant's mother and sister physically took documentation for Applicant to the FC 1 interests section of a foreign embassy does not change the underlying reality that Applicant's mother and sister were helping Applicant to renew his FC 1 passport so that he could give his mother power of attorney to handle property of his deceased father located in FC 1.

(ii) Applicant's witness initially testified that Applicant traveled to FC 1 in 1999 after Applicant's father died. However, when questioned further, Applicant's witness testified that he did not know for sure whether Applicant traveled to FC 1 after reaching FC 4. A review of the record evidence shows Applicant has consistently indicated he last traveled to FC 1 in 1976. Accordingly, the Judge erred by finding "[t]here is also great confusion in the record as to whether Applicant actually traveled to [FC 4] or [FC 1] in 1999."

Any errors identified on appeal must be considered in the context of the Administrative Judge's decision as a whole to determine whether they are harmful or harmless. *See, e.g.*, ISCR Case No. 00-0621 (January 30, 2002) at p. 4. Considering the Judge's findings and conclusions as a whole, the Board concludes the error identified by Applicant is harmless and not outcome-determinative. *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (summarizing harmless error standard).

(iii) There is ample evidence to support the Administrative Judge's finding that Applicant used his FC 1 passport for his

personal convenience. Even if the Board were to assume, solely for the sake of deciding this appeal, that Applicant's use of his FC 1 passport to enter FC 4 in 1999 could be attributed to the exigencies of his mother's medical condition, there is other record evidence supporting the Judge's challenged finding. There is record evidence that Applicant possessed and renewed his FC 1 passport on various occasions before 1999 for reasons unrelated to his mother's medical condition. Furthermore, there is record evidence that Applicant renewed his FC 1 passport in 1999 so that he could give his mother power of attorney to handle his deceased father's property in FC 1.

(iv) The Administrative Judge erred by concluding "there is absolutely no evidence in the record to establish that what was mailed by the Applicant's sister . . . was indeed the Applicant's passport . . ." Applicant presented evidence in support of his claim that his FC 1 passport had been returned. However, that evidence was not binding on the Administrative Judge. As the trier of fact, the Judge is required to consider the evidence presented by Applicant and decide what weight to give it in light of the record evidence as a whole. The Board will not disturb a Judge's weighing of the record evidence unless there is a showing that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 01-08390 (February 12, 2002) at p. 4. Considering the record as a whole, the Judge could conclude Applicant's evidence was not sufficient to find that Applicant had met his burden of proving that he had surrendered his FC 1 passport. However, it was arbitrary and capricious for the Judge to conclude "there is absolutely no evidence" in support of Applicant's claim.

Apart from the Administrative Judge's erroneous conclusions, there is sufficient record evidence that could support the Judge's adverse conclusions under Guideline C. Even if the Board were to assume, solely for the purpose of deciding this appeal, that the Judge's adverse conclusions under Guideline C are not sustainable, the Judge's overall adverse security clearance decision is sustainable under Guideline B.

## 2. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

Applicant also argues: (a) he has reported all his foreign travel to appropriate U.S. government officials; (b) he renewed the FC 1 passport in 1999 in order to deal with serious family problems raised by the poor health of his parents and the death of his father; (c) his use of an FC 1 passport in 1999 occurred before the ASDC3I memorandum was issued, and he would not have used his FC 1 passport then if he had known its use would raise a security concern; (d) he has an unequivocal preference for the United States over FC 1 and is "willing to take whatever actions are necessary to confirm the return of the [FC 1] passport and to renounce any implication of [FC 1] citizenship"; (e) he was not more aggressive in taking such actions before now "because I do not wish to bring undue attention from agents of the [FC 1] government to the work I am doing for the United States"; (f) he has one brother and one sister who are U.S. citizens and who live here; (g) his mother has permanent residency status in the United States, lives here with one of her daughters, and plans to apply for U.S. citizenship when she is eligible; (h) his two sisters in FC 1 have applied to immigrate to the United States and will move here as soon as they receive immigration visas; (i) his friendship with an FC 2 citizen has been based on a professional basis "with a personal component" and he is willing to keep it "strictly professional" if the government thinks his relationship with the friend poses a security risk; (j) his work in support of the Department of Defense and other federal agencies shows he has contributed to the national defense, and that he is not a security risk; and (k) he does not seek a security clearance for personal gain, but so he can contribute support to the United States. The Board construes Applicant's arguments as raising the issue of whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law.

The fact that Applicant reported his foreign trips did not preclude the Administrative Judge from considering the security significance of Applicant's ties with family members living in FC 1 and his possession and use of an FC 1 passport. Similarly, Applicant's work for the Defense Department and other federal agencies did not preclude the Administrative Judge from considering the security significance of Applicant's ties with family members living in FC 1 and his possession and use of an FC 1 passport. Moreover, Applicant's work for the Department of Defense and other federal agencies does not reduce or diminish the security concerns raised by his ties with family members living in FC 1 or his possession and use of an FC 1 passport.

The ASDC3I memorandum specifically indicates that "the applicant's personal convenience, safety, requirements of foreign law, or the identity of the foreign country" do not mitigate the possession and use of a foreign passport. Accordingly, when applying the ASDC3I memorandum in this case, the Administrative Judge was not required to conclude that Applicant's motivation in renewing his FC 1 passport in 1999 extenuated or mitigated his possession and

use of that passport. *See also* ISCR Case No. 99-0424 (February 8, 2001) at p. 13 ("The negative security significance of acts indicative of a foreign preference is not negated or diminished merely because an applicant engages in those acts for personal reasons or for personal convenience."); ISCR Case No. 99-0295 (October 20, 2000) at p. 6 (use of a foreign passport for personal convenience is indicative of a foreign preference under Guideline B).

The fact that Applicant renewed and used his FC 1 passport before the ASDC3I memorandum was issued did not preclude the Administrative Judge from concluding Applicant's case was covered by the terms of that memorandum. *See, e.g.*, ISCR Case No. 00-0489 (January 10, 2002) at pp. 7-8; ISCR Case No. 99-0424 (February 8, 2001) at pp. 6-8. Furthermore, as discussed earlier in this decision, it was not arbitrary, capricious, or contrary to law for the Judge to conclude Applicant's evidence was not sufficient to find that he had in fact surrendered his FC 1 passport. Therefore, apart from Applicant's possession and use of the FC 1 passport in 1999, the Judge's finding that Applicant has not surrendered the FC 1 supported the Judge's application of the ASDC3I memorandum in this case.

The fact that Applicant's mother currently lives in the United States did not preclude the Administrative Judge from considering the security significance of her being an FC 1 citizen with two daughters who are FC 1 citizens who currently live in that country. The fact that Applicant's two sisters living in FC 1 have applied to immigrate to the United States did not preclude the Judge from concluding their current presence in FC 1 raises security concerns under Guideline B.

Applicant's offer to take additional steps to show he does not pose a security risk is not sufficient to demonstrate the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. A promise to take remedial steps in the future does not demonstrate the Judge's findings and conclusions are erroneous. The Judge properly noted that Applicant had the burden of presenting evidence to overcome or rebut the security concerns raised by the facts and circumstances of his case. Considering the record evidence as a whole, it was not arbitrary, capricious, or contrary to law for the Judge to conclude Applicant had not satisfied that burden.

Although the Administrative Judge made some errors, most of her findings of fact and conclusions about Applicant's case are sustainable.

### **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