

DATE: November 13, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-01395

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated January 6, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence). Administrative Judge Matthew E. Malone issued an unfavorable security clearance decision dated July 7, 2003.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

The following issue has been raised on appeal: whether the Administrative Judge's adverse conclusions under Guideline C (Foreign Preference) are arbitrary, capricious, or contrary to law. For the reasons that follow, the Board affirms the Administrative Judge's 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. 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 the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3 (citing Supreme Court decision). In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are

contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3 (citing Supreme Court decisions).

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, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

When an appeal issue 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).

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

Is the error harmful or harmless? *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine);

Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (citing federal cases); and

If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded? (Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3)

Appeal Issue⁽¹⁾

On appeal, Applicant has sought to present additional evidence for consideration by the Board. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. The Board will consider only those arguments made by Applicant that do not rely on new evidence.

Applicant makes several arguments that do not rely on new evidence: (1) she has demonstrated her trustworthiness by voluntarily disclosing to the government information about her possession and use of a German passport; (2) there is no record evidence that shows she lacks the judgment, reliability, and trustworthiness required of persons granted access to classified information; (3) her dual citizenship is legal and does not indicate she lacks integrity, is untrustworthy, or has a preference for a foreign country; (4) her one-time use of a German passport was mitigated because it occurred several years ago, when she was 18 years old; and (5) her German passport has expired and an expired passport cannot raise security concerns. The Board construes these arguments as raising the issue of whether the Administrative Judge's adverse conclusions under Guideline C (Foreign Preference) are arbitrary, capricious, or contrary to law.

Although a lack of honesty and candor with the government can raise serious questions about an applicant's security eligibility, the government can deny or revoke access to classified information for reasons unrelated to a lack of honesty and candor. *See, e.g.*, Directive, Enclosure 2, Item E2.2.3 (listing various Guidelines, many of which do not turn or depend on a showing of a lack of honesty and candor). *See also* ISCR Case No. 02-05585 (March 28, 2003) at p. 3 ("A Judge's finding that an applicant has been truthful and honest with the federal government about his or her conduct and circumstances does not preclude the Judge from considering the security significance of an applicant's conduct and circumstances. Even an honest applicant may pose a security risk based on conduct and circumstances unrelated to the applicant's truthfulness and veracity."). Accordingly, Applicant's voluntary disclosures to the government about her conduct and circumstances did not preclude the Administrative Judge from considering and evaluating the security significance of Applicant's conduct and circumstances under Guideline C (Foreign Preference).

Applicant's second and third arguments overlap and can be addressed together. Given the record evidence in this case, the Administrative Judge had a rational basis for concluding that security concerns were raised under Guideline C by the totality of Applicant's dual citizenship, her exercise of the rights and privileges of German citizenship (by obtaining and using a German passport), and her stated desire to retain her German citizenship and her concomitant unwillingness to renounce her German citizenship. The legality of Applicant's actions and circumstances did not preclude the Judge from considering whether they raise security concerns under Guideline C. *See, e.g.*, ISCR Case No. 01-02452 (November 21, 2002) at p. 8 (citing other Board decisions). Furthermore, Applicant's exercise of the rights and privileges of German citizenship, taken into consideration with her stated desire to retain her German citizenship, provided a rational basis for the Judge to express doubts as to whether Applicant had a clear preference for the United States.

Applicant correctly notes that the passage of time since she last used a German passport is a factor to be considered in her case. *See* Directive, Section 6.3.2 (security clearance decision should take into account various factors, including "[f]requency and recency of the conduct"); Enclosure 2, Item E2.2.1.3 (same).⁽²⁾ A review of the decision below shows that the Administrative Judge specifically took note of the passage of time since Applicant last used a German passport, but explained why he had concerns under Guideline C despite the passage of that time. The Judge's explanation is not arbitrary, capricious, or contrary to law in light of the record evidence as a whole.

Applicant's argument about the expiration of her German passport does not demonstrate the Administrative Judge erred. The Judge's discussion about Applicant's expired German passport is a bit attenuated. It is always possible that an applicant with dual citizenship might try to renew an expired foreign passport at some future date. (Indeed, it is always possible that an applicant with dual citizenship who has never obtained a foreign passport in the past could try to do so at some future date). Although security clearance decisions involve predictive judgments,⁽³⁾ some possibilities may be so speculative or tenuous as to be insufficient to provide a rational basis for making a security clearance decision. However, to decide this appeal, the Board need not articulate any formula or standard for deciding when a possibility is too speculative or tenuous to provide a sufficient basis for a security clearance decision. Even if the Board were to conclude that an adverse security clearance could not be based solely on the mere possibility an applicant with dual citizenship might seek to renew an expired foreign passport at some future date, such a conclusion would not lead to a finding that the Judge erred in this case. The Judge did not base his adverse security clearance decision solely on Applicant's expired German passport and the possibility that she might try to renew it in the future. Rather, the Judge indicated that Applicant's intention to retain her German citizenship raised questions about "her future intent regarding her foreign citizenship, and those questions create doubts about Applicant's suitability to hold a clearance. Any such doubts must be resolved in favor of the national interest." Given the record evidence in this case concerning Applicant's past exercise of the rights and privileges of German citizenship and her expressed unwillingness to renounce her German citizenship, the Judge's reasoning is not arbitrary, capricious, or contrary to law.

Conclusion

Applicant has failed to demonstrate error below. Therefore, 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: William S. Fields

Williams S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to Guideline B (Foreign Influence). Those favorable formal findings are not at issue on appeal.
2. The force of Applicant's argument is undercut by the fact that she renewed her German passport in 1995. Although renewal of a foreign passport is factually distinguishable from use of a foreign passport, renewal of a foreign passport is evidence that an applicant is exercising the rights and privileges of foreign citizenship.
3. *See* Directive, Section 6.3.6 ("Probability that the circumstances or conduct will continue or recur in the future"); Directive, Enclosure 2, Item E2.2.1.9 ("The likelihood of continuation or recurrence").