

DATE: March 12, 2003

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-09085

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

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

**FOR APPLICANT**

*Pro Se*

Administrative Judge Richard A. Cefola issued a decision, dated October 29, 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.

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 Applicant's loyalty to the United States was erroneously challenged; and (2) whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board affirms the Administrative Judge's decision.

**Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) to Applicant, dated May 10, 2002. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence). A hearing was held on October 9, 2002.

The Administrative Judge issued a written decision dated October 29, 2002, in which he 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 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 Issues<sup>(1)</sup>

1. Whether Applicant's loyalty to the United States was erroneously challenged. Applicant was born in a foreign country (hereinafter Country A)<sup>(2)</sup> and immigrated to the United States in 1967. He became a naturalized United States citizen in 1974. He owns property and has relatives in Country A. The Administrative Judge found that Applicant executed a sworn statement in July 2001 in which he expressed an intention to become a dual national by reacquiring the citizenship of Country A.<sup>(3)</sup> The Judge also found that at the hearing he reaffirmed his intention to establish dual citizenship with Country A. The Judge concluded that Applicant's intention to obtain Country A citizenship was unequivocal and evidenced a preference for Country A over the interests of the United States. Therefore, it was not clearly consistent with the national interest to grant a security clearance to Applicant.

Applicant asserts on appeal that his loyalty to the United States has erroneously been called into question by the adverse decision of the Administrative Judge. In making his foreign preference finding, the Administrative Judge made no comment that can be interpreted as questioning Applicant's loyalty to the United States. In fact, the Judge noted that in seeking Country A citizenship, Applicant was in essence seeking to pledge allegiance to both countries. The Judge made a security risk assessment based on Applicant's stated intention to obtain Country A citizenship at some time in the future. By stating such an intention, Applicant, notwithstanding a professed loyalty to the United States, is indicating his future intention to place himself in a position where he may be forced to choose between acting in accordance with the interests of Country A as opposed to those of the United States. The Administrative Judge, in keeping with the "clearly consistent with the national interest" standard, could properly conclude that Applicant was stating an intention to take action that would place him in a situation that raises serious security concerns. *See, e.g.*, ISCR Case No. 01-00677 (May 21, 2002) at p. 5 (noting that serious security concerns are raised by an applicant's efforts to obtain foreign citizenship even if those efforts do not succeed); ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (noting security significance of an applicant's actions undertaken to protect the applicant's ability to claim the rights and privileges of foreign citizenship). The Judge's conclusions were reached without questioning Applicant's loyalty to the United States.

2. Whether the Administrative Judge's decision was arbitrary, capricious or contrary to law. On appeal, Applicant states: (i) the only reason he made a dual citizenship inquiry was to enable him to own and register a car in Country A; (ii) the fact that Applicant inherited property in Country A and pays taxes on the property to the Country A government should not suggest that his loyalty to the United States is compromised; and (iii) Applicant was simply making inquiry into obtaining dual citizenship and now that he recognizes the gravity of the situation, he is willing to abandon his pursuit of dual citizenship. The Board construes these arguments as asserting that the Judge's decision is arbitrary, capricious or contrary to law.

The acquiring of citizenship in a country (especially voluntarily as an adult) is a serious matter with profound consequences for an individual in numerous aspects of his or her life. The motivations for obtaining citizenship do not enlarge or diminish the substantial bundle of rights and duties that flow from gaining citizenship. The Administrative Judge was not obliged to dismiss as trivial Applicant's inquiries into obtaining Country A citizenship simply because Applicant saw citizenship primarily as a means to own and register a car in Country A. The Administrative Judge was also not obliged to accept Applicant's suggestion that his future exercise of Country A citizenship would be confined only to the purchase and registration of an automobile. Applicant's argument does not establish error on the part of the Administrative Judge.

Applicant asserts that his holding of property and paying taxes on the property in Country A should not suggest that his loyalty to the United States is compromised. As indicated at an earlier point in this decision, the Administrative Judge

made no finding or conclusion that Applicant was not loyal to the United States. To the extent Applicant argues that his holding of property in Country A and payment of property taxes in Country A do not provide a basis (either in whole or part) for the Judge's adverse security clearance determination, Applicant's argument highlights a defect in the Judge's decision. It is not clear from the Administrative Judge's decision whether or not Applicant's real property or tax obligations in Country A were part of his ultimate decision to deny Applicant a security clearance. The Judge appears to base his decision to deny Applicant a clearance under the Foreign Preference Guideline (SOR Paragraph 1, Guideline C) solely on Applicant's stated intention to obtain Country A citizenship. The Judge then discusses Applicant's financial interests in the context of his analysis of the case under the Foreign Influence Guideline (Guideline B). There the Judge states, "As to his financial interests in Country A, I also find them to be of little consequence when compared with his substantial financial interests in the U.S." Nevertheless, when making his formal findings at the end of his decision, the Administrative Judge finds against Applicant under subparagraphs 1.c and 1.e of the SOR. The Judge fails to explain why he concludes Applicant's ownership of a two-story home in Country A and his payment of taxes on Country A properties raise security concerns under the Foreign Preference Guideline despite his conclusion that Applicant's financial interests in Country A were of no great consequence.<sup>(4)</sup> The Judge's failure to give such an explanation leaves the Board unable to discern whether the Judge had a rational basis for his conclusions or whether the Judge acted in an arbitrary or capricious manner.

The Board has the option of remanding the case to the Administrative Judge to eliminate the confusion created by his failure to adequately explain his reasoning. However, because the Judge's findings and conclusions regarding Applicant's intention to obtain Country A citizenship are sustainable and provide an adequate basis for his adverse security clearance decision, the Board declines to exercise that option. *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine).

Applicant asserts on appeal that now that he recognizes the effect his earlier pronouncements concerning Country A citizenship are having on his security clearance eligibility, he will desist from future efforts to gain Country A citizenship. This assertion of current intent on appeal constitutes new evidence, which the Administrative Judge did not have the benefit of considering and which the Board cannot now consider in reviewing the legal sufficiency of the Judge's findings and conclusions.

### **Conclusion**

Applicant has failed to demonstrate error below that warrants remand or reversal. 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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. The Administrative Judge ultimately made formal findings favorable to the Applicant under the SOR paragraph dealing with Guideline B, Foreign Influence (Paragraph 2). Those favorable formal findings are not at issue on appeal.
2. In the decision below, the Administrative Judge referred to the foreign country as Country A. Since the identity of the foreign country does not appear to be relevant to any of the appeal issues, the Board will refer to it by the identifier used by the Judge.
3. A review of the record indicates that the statement was actually executed in December 2001.
4. Applicant's brief correctly notes the Administrative Judge did not enter formal findings with respect to SOR subparagraphs 1.b and 1.g. The Judge's failure to do so constitutes a violation of Directive, Additional Procedural Guidance, Item E3.1.25. However, the Judge's error on this point constitutes harmless error under the particular facts of this case. As discussed elsewhere in this decision, the Judge's unfavorable security clearance decision is sustainable for reasons independent of SOR subparagraphs 1.b and 1.g. Accordingly, reversal would not be warranted and no useful purpose would be served by remanding the case to the Judge with instructions to issue a new decision that includes formal findings regarding SOR subparagraphs 1.b and 1.g.