

DATE: May 13, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0403

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

William S. Fields, Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Elizabeth M. Matchinski issued a decision dated January 29, 1998, in which she 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.

The 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 issue of whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons dated August 6, 1997 to Applicant. The SOR was based on Criteria B (Foreign Influence) and C (Foreign Preference). The allegations under Criterion B were: (1) members of Applicant's immediate family, with whom he has close ties, are citizens of and reside in a foreign country (referred to in decision below as foreign country A), and (2) Applicant shares living quarters with his brother, a citizen of foreign country A. The allegations under Criterion C were: Applicant exercised dual citizenship by (1) possession and use of a foreign country A passport to travel to and from foreign country A, and (2) stating a willingness to bear arms and fight for foreign country A.

Applicant submitted an answer to the SOR and requested an adjudication of his case without a hearing. A File of Relevant Material (FORM) was prepared and a copy provided to Applicant. Applicant submitted additional information in response to the FORM.

The case was initially assigned to Administrative Judge Paul J. Mason, but was later transferred to Administrative Judge Elizabeth M. Matchinski. The Judge subsequently issued a written decision 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.

Appeal Issue⁽¹⁾

Applicant asserts several arguments in support of his appeal. Applicant's arguments as to Criterion B include: (1) Applicant does not believe he is a security risk because his brother, who lives with Applicant, has not been naturalized due to delays by the Immigration and Naturalization Service; (2) Applicant's brother has not visited country A in about 10 years; (3) Applicant and his brother immigrated to the United States to make new lives for themselves and avoid conflict in country A; (4) while Applicant loves his parents, who still reside in country A, Applicant has chosen the United States over country A. Additionally, Applicant has argued with respect to Criterion C that (5) he would never bear arms for country A; (6) the Judge erred when she concluded that the Applicant has a financial stake in country A because he might inherit from his parents; and (7) his use of foreign country A passport was sanctioned by the United States and should not be held against him. As to both Criterion B and Criterion C, Applicant asserts he is a loyal citizen of the United States and wants to serve the United States by working in the defense contracting area. The Board construes the above arguments as an assertion that the Administrative Judge's decision was arbitrary, capricious and contrary to law.

Applicant's first three arguments may be considered together. Essentially, Applicant argues that his brother should not be considered a security risk because the brother is here to become a United States citizen and therefore the brother's status as a foreign citizen should not interfere with Applicant's security clearance. Applicant's arguments amount to a plausible interpretation of the record evidence. However, the Administrative Judge's decision reflects an alternative view of the record evidence. The Board need not agree with an Administrative Judge's findings and conclusions to decide that there is substantial record evidence which support her findings and conclusions. *See, e. g.*, ISCR Case No. 97-0202 (January 20, 1998) at p. 4 (ability of appealing party to argue for an alternate interpretation of record evidence is insufficient to demonstrate Judge erred). Applicant did not demonstrate error on these matters.

Applicant's fourth and fifth arguments also may be analyzed together. Applicant argues he has chosen the United States over country A and he would never bear arms for country A. The Administrative Judge expressed doubts about Applicant's position on this point because Applicant gave a written statement in May 1997 (FORM, Item 5) in which he indicated he would "bear arms to defend [country A]." Although Applicant conceded he read and signed that statement, he asserted it did not accurately or clearly represent his meaning (Applicant's response to FORM). As the trier of fact, the Judge had primary responsibility to weigh the evidence and make factual findings. Directive, Additional Procedural Guidance Item 25. Although Applicant could try to explain or even retract his written statement about bearing arms for country A, the Judge was not bound, as a matter of law, to accept Applicant's explanation or retraction. *See, e.g.*, DISCR Case No. 93-1234 (May 19, 1995) at p. 6. The Judge could have accepted Applicant's explanation or retraction, but she decided not to. Nothing in the record evidence persuades the Board that the Judge's choice in this matter was arbitrary, capricious, or contrary to law.

Applicant's sixth argument is persuasive. Applicant does not have a financial stake in country A merely because he may (or may not) inherit unknown real or personal property at some time in the future from his parents who currently reside in country A (although his mother has a US alien registration). The situation is full of possibilities that may or may not occur. For example, Applicant may not inherit because he dies before his parents, he is disinherited by his parents, his parents die without any property that can be inherited, or the laws of country A preclude Applicant from inheriting. Alternatively, Applicant might inherit personal property under circumstances that raise none of the security concerns underlying Criterion B or Criterion C. The record evidence in this case does not provide a basis for a reasonable inference that Applicant has a financial stake in country A. Although Applicant has demonstrated error here, the error is harmless in light of the Judge's other findings and conclusions, which are sustainable.

Applicant's seventh argument is moot. The Administrative Judge found Applicant's proffered evidence concerning use of a country A passport to be persuasive and entered a formal finding as to the SOR allegation pertaining to Applicant's use of a country A passport. Because of the Judge's favorable formal finding, Applicant suffered no harm or prejudice from that SOR allegation.

Conclusion

Applicant has failed on appeal to demonstrate error which warrants remand or reversal. The Administrative Judge's

decision is sustained.

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 entered a formal favorable finding with respect to SOR subparagraph 2.b. That favorable formal finding is not at issue on appeal.