DATE: November 24, 1998

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 97-0699

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Richard A. Cefola issued a decision, dated June 25, 1998, 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 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 (SOR) dated November 13, 1997 to Applicant.[(1)] The SOR was based on Criterion C (Foreign Preference) and Criterion B (Foreign Influence).

Applicant submitted a response to the SOR, in which he indicated "I do not wish to have a hearing." A File of Relevant aterial (FORM) was prepared. Applicant was provided with a copy of the FORM, and he submitted a response to it.

The Administrative Judge issued a written decision, dated June 25, 1998, 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 that adverse decision.

Appeal Issue[(2)]

Applicant contends the Administrative Judge's adverse security clearance decision should be reversed because: (1) he has always been forthright and cooperative with the Department of Defense (DoD) about his contacts with Country B; (2) he is a loyal United States citizen; (3) he has been a United States citizen since 1989 with extensive personal, family, and financial ties to the United States; (4) his financial ties to Country B are significantly less than his financial ties to the United States; (5) his actions in founding a business in Country B were necessary to protect the needs of two United

States businesses; (6) he no longer holds and no longer uses a Country B passport; (7) he no longer is a CEO of a nonprofit corporation in Country B; (8) Country B does not have interests that are inimical to the United States; (9) no foreign person or organization has approached Applicant or his family to obtain information; (10) the Judge failed to consider various mitigating factors; (11) the retirement/pension benefits to which Applicant is eligible because of his position as a professor in Country B are not significant in comparison to his financial interests in the United States and cannot be used to threaten or coerce him; (12) he is not susceptible to coercion because his shares in a small foreign business are of little or no financial value; and (13) the totality of his personal and professional life provides no basis to question his loyalty to the United States and demonstrates there is no basis for fear he would demonstrate a foreign preference or be vulnerable to foreign influence. The Board construes Applicant's contentions as raising the issue of whether the Judge's adverse decision is arbitrary, capricious, or contrary to law.[(3)]

The record evidence supports Applicant's assertion that he has been candid and cooperative with the DoD about his contacts with Country B. However, that evidence does not render the Administrative Judge's decision arbitrary, capricious, or contrary to law. An applicant's honesty and candor about the applicant's conduct does not immunize that conduct from consideration for its security significance. *See, e.g.*, ISCR Case No. 98-0223 (October 29, 1998) at p. 4.

Applicant's loyalty argument is misplaced. Section 7 of Executive Order 10865 provides that industrial security clearance decisions will not be loyalty determinations. Nothing in the decision below indicates or suggests that the Administrative Judge made a determination as to Applicant's loyalty. Rather, the Judge evaluated the facts and circumstances of Applicant's case under pertinent provisions of the Directive.

Applicant's citation to favorable record evidence does not demonstrate the Administrative Judge erred. The Judge must consider all available information, both favorable and unfavorable. Directive, Section F.3. In doing so, the Judge must consider whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. *See, e.g.*, ISCR Case No. 98-0123 (October 28, 1998) at p. 3. Absent a showing of action by the Judge that is arbitrary, capricious, or contrary to law, the Board will not disturb the Judge's weighing of the record evidence. *Id*. Error is not demonstrated by the fact that Applicant can argue for an alternate weighing of the record evidence. A review of the record as a whole persuades the Board that, with one exception that constitutes harmless error, the Judge weighed the evidence in a reasonable manner and made factual findings that reflect a plausible interpretation of the record evidence as a whole.

Nothing in Criterion B or Criterion C requires that the foreign country in question have interests that are inimical to the interests of the United States. The primary purpose of the industrial security program is to protect classified information. The federal government is entitled to protect classified information from any person, organization, or nation not authorized to receive it, regardless of whether that person, organization, or nation has interests inimical to those of the United States. Accordingly, the absence of evidence that Country B has interests inimical to those of the United States does not render the Administrative Judge's decision arbitrary, capricious, or contrary to law.

The absence of evidence that Country B has approached Applicant, directly or through his family, to obtain access to classified information did not preclude the Administrative Judge from making an adverse decision. The federal government has a compelling interest in protecting and safeguarding classified information. *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988). The federal government need not demonstrate that there is a "clear and present danger that a breach of security is actually threatened" before it can decide to deny or revoke an applicant's access to classified information. *Adams v. Laird*, 420 F.2d 230, 238 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). The totality of the following facts provided a rational basis for the Judge's findings and conclusions under Criterion B and Criterion C: Applicant's exercise of citizenship of Country B; Applicant's voluntary possession and use of a Country B passport; Applicant's position as a professor of a state university in Country B; Applicant's involvement in two foreign entities or businesses in Country B; and Applicant's significant financial interests in Country B (primarily substantial retirement benefits associated with the professorship in Country B).

On appeal, Applicant contends the Administrative Judge erred by finding that he is a CEO of a nonprofit corporation in Country B. Specifically, Applicant argues that he held that position in the past, but does not hold it currently. In support of this contention, Applicant refers to his answer to the SOR and his response to the FORM. This contention is not persuasive. A review of the record evidence shows that Applicant, in January 1998, projected surrendering his position in arch 1998. However, the record evidence contained no confirmation that this event had actually occurred. Thus, the

Judge's finding on this point reflects a plausible interpretation of the record evidence. Nothing in Applicant's answer to the SOR or his response to the FORM precluded the Judge from finding that Applicant is a CEO of a nonprofit corporation in Country B. Applicant's record statements about his status with that nonprofit corporation do not compel the interpretation he asserts on appeal.

Applicant identifies one flaw with the Administrative Judge's decision. The record evidence shows that in March 1998 Applicant resumed residence in the United States and took full-time employment with a United States company. Furthermore, there is no record evidence that Applicant has used his Country B passport since resuming residence in the United States. Despite that record evidence, the Judge refers to Applicant's use of a Country B passport in the present tense. The Board does not review a sentence of a Judge's decision in isolation. Rather, the Board reviews a Judge's decision in its entirety. *See, e.g.*, ISCR Case No. 96-0522 (May 1, 1997) at p. 3. Given the totality of the record evidence (including the evidence that Applicant is on leave from his professorial post in Country B until December 31, 1999), the Judge's reference to Applicant's use of a Country B passport in the present tense is harmless error that does not warrant a remand. *See, e.g.*, ISCR Case No. 97-0707 (September 1, 1998) at p. 3 (applying harmless error doctrine).

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's June 25, 1998 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 in the case file bears a handwritten notation "Remailed:" that is followed with a date stamp that reads "JAN - 2 1998."

2. The Administrative Judge entered a formal finding in Applicant's favor with respect to SOR ¶ 2.b. That formal finding is not at issue on appeal.

3. Applicant also explains why he did not retain a lawyer to represent him. Because Applicant's explanations are not relevant to the appeal arguments he makes, the Board need not address those explanations. *See* Directive, Additional Procedural Guidance, Item 32 ("The Appeal Board shall address the *material issues* raised by the parties to determine whether harmful error occurred.")(italics added).