

DATE: September 15, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0252

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Esq., Department Counsel

FOR APPLICANT

Glade F. Flake, Esq.

Administrative Judge Kathryn M. Braeman issued a decision, dated April 16, 1999, in which she concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed. For the reasons set forth below, the Board reverses 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.

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge erred by failing to consider the likelihood of recurrence of Applicant's conduct; (2) whether the Administrative Judge erred in applying pertinent Adjudicative Guidelines; and (3) whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated October 29, 1998 to Applicant. The SOR was based on Criterion C (Foreign Preference) and Criterion B (Foreign Influence).

A hearing was held on February 8, 1999. The Administrative Judge subsequently issued a written decision in which she concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Department Counsel's appeal from that favorable decision.

Administrative Judge's Findings and Conclusions⁽¹⁾

Applicant's father was a U.S. citizen who married Applicant's mother, a citizen of a foreign country (hereinafter FC 1). Applicant's parents moved to the United States after getting married and returned to FC 1 two years later. Applicant was born in FC 1 several years after his parents returned there. Applicant is a dual national with U.S. citizenship and FC 1 citizenship.

After Applicant's parents divorced, he moved to the United States to live with his father. Applicant's wife was born in

FC 1, but is a U.S. citizen. Applicant has three children born in the United States who are U.S. citizens.

Applicant is the president and owner of two U.S. corporations. Applicant is a major stockholder of three foreign corporations. Applicant and his wife own 90% of Corporation 1, and another individual owns the remaining 10%. Applicant incorporated Corporation 1 in FC 1 based on legal advice. The products of Corporation 1 are sold to FC 1's military and never go outside FC 1; Applicant monitors sales to ensure none go to countries that are inimical to the United States. Applicant incorporated Corporation 2 in FC 3 based on legal advice. Corporation 2 is owned 95% by Applicant's U.S. corporation and 5% by another individual. Corporation 2 provides services using parts purchased from Applicant's U.S. owned company in the United States. Applicant incorporated Corporation 3 in FC 4 as required by FC 4 law. Corporation 3 is owned by Applicant's U.S. corporation and Applicant himself. Applicant has sold equipment to FC 1 and FC 4. All three foreign corporations support Applicant's U.S. corporation.⁽²⁾

Applicant and his wife inherited an apartment in FC 1 from his wife's mother.

Applicant's financial interests in foreign countries do not raise security concerns under Criterion B.

Applicant obtained an FC 1 passport in December 1996 to expedite his travel overseas, especially his arrival in FC 4. Applicant would often experience a two to three-hour wait in line if he used his U.S. passport when entering FC 4. So, when entering FC 4, Applicant used his U.S. passport when there was no line, but used his FC 1 passport when there was a line. Applicant used his FC 1 passport to enter another foreign country because there was a line, but he has never used his FC 1 passport to enter FC 1.

Applicant does not maintain dual citizenship to protect financial interests in foreign countries. Applicant did not obtain an FC 1 passport because he had a preference for FC 1 over the United States; he uses the FC 1 passport only for convenience. Applicant has never voted in a foreign election and has never held political office in a foreign country. Applicant has never been employed as an agent or other representative of a foreign government. Applicant would be willing to give up his FC 1 passport and to renounce his FC 1 citizenship if required to keep his security clearance. Applicant's exercise of dual citizenship is not illegal and therefore is sanctioned by the United States.

There is little probability, if any, that Applicant will act in preference for FC 1 over the United States. Applicant studied in the United States and served in the U.S. military (inactive reserve) for approximately 12 years. Applicant has a history of loyalty to the United States and no longer plans to exercise the rights or privileges of his FC 1 citizenship.

Any security concerns over Applicant's dual citizenship are overcome by substantial evidence of affirmative action that reflects his preference for the United States over FC 1.

Appeal Issues

1. Whether the Administrative Judge erred by failing to consider the likelihood of recurrence of Applicant's conduct. Department Counsel contends the Administrative Judge failed to consider the likelihood Applicant would repeat his conduct. In support of this contention, Department Counsel argues: (a) the Judge failed to consider the likelihood that Applicant will continue to possess and use his FC 1 passport in connection with his frequent business trips; and (b) the Judge failed to consider the likelihood that Applicant will continue to have foreign financial interests.

Department Counsel's first argument overlaps its argument about Foreign Preference Mitigating Condition 4. The Board will address this argument when it addresses Department Counsel's argument about Foreign Preference Mitigating Condition 4.

Department Counsel's second argument lacks merit. The Administrative Judge did not fail to consider the likelihood that Applicant will continue to have foreign financial interests. A fair reading of the decision shows the Judge was well aware that Applicant will continue to have foreign financial interests.

2. Whether the Administrative Judge erred in applying pertinent Adjudicative Guidelines. Department Counsel contends the Administrative Judge erred by applying Foreign Preference Mitigating Conditions 1, 3 and 4 and Foreign Influence Mitigating Condition 5. For the reasons that follow, the Board concludes Department Counsel's contention has mixed

merit.

a. Foreign Preference Mitigating Condition 1.⁽³⁾ Department Counsel argues the Administrative Judge erred in applying Mitigating Condition 1 because Applicant exercised dual citizenship when he voluntarily obtained and used an FC 1 passport. This argument has merit.

A copy of Applicant's FC 1 passport was admitted into evidence. In that passport, Applicant is clearly identified as an FC 1 national. Furthermore, there is no dispute Applicant used his FC 1 passport on various business trips to foreign countries other than FC 1. By obtaining and using an FC 1 passport, Applicant engaged in the exercise of the rights and privileges of an FC 1 citizen. By doing so, Applicant clearly was engaged in the exercise of dual citizenship. Therefore, the Administrative Judge acted in an arbitrary and capricious manner when she applied Mitigating Condition 1 in this case.

b. Foreign Preference Mitigating Condition 3.⁽⁴⁾ Department Counsel argues the Administrative Judge erred in applying Mitigating Condition 3 because: (i) the Judge's application of Mitigating Condition 3 in this case renders meaningless the government's concerns about foreign preference, is illogical, and is contrary to prior Board rulings; and (ii) the Judge's application of Mitigating Condition 3 is not supported by the record evidence.

(i) Department Counsel's references to a prior Board decision are not persuasive. First, the Board decision specifically cited by Department Counsel in support of its arguments does not address Mitigating Condition 3, directly or indirectly. Accordingly, the Administrative Judge's application of Mitigating Condition 3 -- even if erroneous -- cannot fairly be said to be contrary to the Board's rulings in that case.

Second, Department Counsel's reliance on a cited Board decision is misplaced for another reason. Department Counsel correctly notes the cited decision states the general principle that the legality of an applicant's conduct does not preclude the government from deciding whether an applicant's conduct has security significance. However, the Board's observation in that case is irrelevant if the record evidence shows that an applicant's conduct was sanctioned by the U.S. government within the meaning of Mitigating Condition 3. *See, e.g.,* ISCR Case No. 98-0320 (April 8, 1999) at p. 3 (general legal principles do not apply when there is a specific provision of law that covers an issue in a case). To the extent that Mitigating Condition 3 can be applied properly in a case, there is nothing illogical about a Judge doing so in a Criterion C case.

(ii) This is the first case before the Board that requires it to address and interpret Mitigating Condition 3.⁽⁵⁾ For the reasons that follow, the Board concludes the Administrative Judge erred by applying Mitigating Condition 3.

Merely because an applicant's conduct is legal it does not follow that the applicant's conduct has been sanctioned by the federal government within the meaning of Mitigating Condition 3. Merely because the federal government has not criminalized or civilly prohibited a particular type of conduct does not mean that the federal government has approved, authorized, consented to, or otherwise sanctioned that conduct. What is required under Mitigating Condition 3 is evidence that the federal government has indicated that it affirmatively approves, authorizes, consents to, or otherwise sanctions a particular type of act or conduct, either as part of an official policy or with respect to a particular applicant.

Department Counsel correctly notes that the record contains a State Department document which addresses dual nationality. Department Counsel cites a portion of that document which states "the U.S. Government does not endorse dual nationality as a matter of policy because of the problems which it may cause." However, the same document also acknowledges "The laws of the United States, no less than those of other countries, contribute to the situation because they provide for acquisition of U.S. citizenship by birth in the United States and also by birth abroad to an American, regardless of the other nationalities which a person might acquire at birth." [The State Department document goes on to cite two examples of situations where American law helps create dual nationality issues.] The cited language and other portions demonstrate that, to some extent, the State Department document can be construed to support both sides of the general question of U.S. government sanctioning of the status of dual nationality. However, the legality of the status of dual nationality and its recognition by the federal government is not the issue here. Under Criterion C, the issue is not whether an applicant is a dual national, but rather whether an applicant shows a preference for a foreign country through actions. *See* various Foreign Preference Disqualifying Conditions.

In this case, Applicant's conduct consisted of two elements: use of a foreign passport and active ownership and participation in foreign business activities. As to the specific matter of use of a foreign passport by a dual national, the only situation which the State Department document might be said to sanction is a dual national's use of a foreign passport to enter or leave the foreign country of which he is a citizen because the foreign country requires the dual national to do so. In the instant case, Applicant used his FC 1 passport to enter foreign countries other than FC 1 for his convenience. Furthermore, the State Department document does not address active ownership and participation in foreign business activities. In addition, there is no evidence that the federal government approved, authorized, consented to, or otherwise sanctioned Applicant's actions independently of its general policy on dual nationality. Accordingly, the Administrative Judge had no basis in the record evidence to apply Foreign Preference Mitigating Condition 3 to Applicant's conduct in this case.

c. Foreign Preference Mitigating Condition 4.⁽⁶⁾ Department Counsel contends the Administrative Judge erred by applying Mitigating Condition 4 because: (i) the record evidence does not support the Judge's finding that Applicant made a "clear statement that he is willing to give up his [FC 1] passport and renounce his dual citizenship"; and (ii) the Judge failed to consider the likelihood that Applicant will continue to possess and use his FC 1 passport in connection with his frequent business trips. This contention has mixed merit.

There is no record evidence that, prior to the hearing, Applicant expressed a willingness or intention to give up his FC 1 passport or renounce his FC 1 citizenship.⁽⁷⁾ At the hearing, Applicant testified that he would not continue to use his FC 1 passport if doing so would jeopardize his security clearance and that he would be willing to give up that passport (Hearing Transcript at p. 96). Applicant also testified that he would be willing to renounce his FC 1 citizenship if he had to do so to retain a security clearance (Hearing Transcript at p. 106). Applicant's statements do not fall to the level of conflicting and equivocal statements made by the applicant in ISCR Case No. 98-0507 (May 17, 1999), cited by Department Counsel in support of its argument. The Board need not agree with the Judge's characterization that Applicant made a "clear statement" to conclude Department Counsel's argument falls short of demonstrating the Judge erred by concluding that Applicant's statements were sufficient to allow application of Mitigating Condition 4. However, as will be discussed later in this decision, there is merit to Department Counsel's argument concerning the security significance of Applicant's conditional willingness to renounce his FC 1 citizenship and give up his FC 1 passport.

d. Foreign Influence Mitigating Condition 5.⁽⁸⁾ Department Counsel contends it was arbitrary and capricious for the Administrative Judge to apply Mitigating Condition 5 because: (i) it was "illogical" for the Judge to conclude there was no security significance to Applicant's foreign corporations because they were owned by Applicant's U.S. corporation and/or by Applicant and his wife personally; (ii) the Judge's reasoning failed to involve any analysis of the facts and circumstances of Applicant's foreign interests; and (iii) the Judge's application of Mitigating Condition 5 is not supported by the record evidence. This contention has merit.

The specific manner in which Applicant owns the three foreign corporations is legally and logically irrelevant to whether Applicant's interests in those corporations was "minimal" under Mitigating Condition 5. The Administrative Judge's consideration of Mitigating Condition 5 also failed to take into account the record evidence as a whole, as required by Section F.3. The record evidence as a whole indicates Applicant's financial interests in the three foreign corporations are far from "minimal." Accordingly, the Judge's application of Mitigating Condition 5 was arbitrary and capricious.

3. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Department Counsel also contends the Administrative Judge's decision is arbitrary, capricious, or contrary to law because: (a) Applicant has expressed only a conditional willingness to renounce his FC 1 citizenship; (b) the Judge failed to give due weight to the security significance of Applicant's voluntary procurement and use of an FC 1 passport; (c) the Judge improperly injected Applicant's loyalty into her analysis; (d) the Judge erred by concluding Applicant's financial interests were not of security concern because the three foreign corporations were not foreign owned; (e) the Judge's analysis of Applicant's financial interests in other countries failed to consider Foreign Influence Disqualifying Condition 8; and (f) the totality of the Judge's errors warrant reversal.

(a) Department Counsel's reliance on the Board's decision in ISCR Case No. 98-0705 (July 14, 1998) is misplaced. In that case, Department Counsel argued that an applicant who expresses a conditional intention of renouncing FC citizenship and giving up an FC passport is indicating a preference to keep his or her job with a defense contractor rather than a preference for the United States over the FC. In deciding that case, the Board did not accept or reject Department Counsel's argument, but decided the appeal issues on other grounds. Specifically, the Board concluded that the Administrative Judge had erred because the record evidence in that case was not clear or unequivocal that Applicant was willing to renounce his FC citizenship and give up his FC passport. Department Counsel's argument misses the point that is a difference between the nature of the record evidence and the nature of an applicant's intention. There can be clear and unequivocal evidence that an applicant expresses a conditional intention to do or refrain from doing a particular action. On the other hand, there can be conflicting and equivocal evidence that makes it difficult to discern whether or not an applicant is expressing an unconditional or unqualified intention to do or refrain from doing a particular action.

Department Counsel also argues that Applicant's statements of a conditional willingness to renounce FC 1 citizenship and give up his FC 1 passport tend to undercut the Administrative Judge's conclusion that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. This is persuasive. As discussed earlier in this decision, the Board concluded the Judge had a sufficient basis to apply Foreign Preference Mitigating Condition 4 in this case. However, Adjudicative Guidelines disqualifying or mitigating conditions cannot be viewed in isolation, but rather must be considered and weighed in light of the record evidence as a whole and in common sense manner. *See, e.g.*, ISCR Case No. 98-0803 (August 17, 1999) at p. 4. Accordingly, the ability of the Judge to conclude Mitigating Condition 4 is applicable does not end the analysis.

As a matter of common sense (Directive, Section F.3.), an unqualified or unconditional willingness to renounce foreign citizenship and give up a foreign passport should be given more weight than a qualified or conditional willingness to do so. *Cf. Petition of Naturalization of Kassas*, 788 F. Supp. 993 (M.D. Tenn. 1992)(naturalization petition denied where petitioner's expressed reservations about bearing arms on behalf of United States under some circumstances demonstrated petitioner was not able to take naturalization oath without mental reservations). Furthermore, given the "clearly consistent with the national interest" standard, an applicant has a heavy burden of persuasion to demonstrate extenuation or mitigation of conduct or circumstances that raise serious concerns about the applicant's security eligibility. *See, e.g.*, ISCR Case No. 98-0723 (June 16, 1999) at p. 3. Considering the record as a whole, the Board concludes the Judge gave undue weight to Mitigating Condition 4 under the particular facts of this case.

(b) Department Counsel contends the Administrative Judge failed to give due weight to the security significance of Applicant's voluntary procurement and use of an FC 1 passport. The record evidence shows that Applicant voluntarily procured an FC 1 passport for his personal convenience in conducting business overseas, and that Applicant used that FC 1 passport in preference to his U.S. passport whenever doing so was convenient to him in entering a foreign country. When using the FC 1 passport, Applicant was exercising the rights and privileges of an FC 1 national, and was holding himself out to others as an FC 1 national, not a U.S. citizen. The Judge acted in an arbitrary and capricious manner by giving reduced weight to the significance of Applicant's procurement and use of an FC 1 passport because Applicant was merely acting out of personal convenience. The absence of sinister motives did not reduce the negative security implications of Applicant's voluntary procurement and use of an FC 1 passport. *See, e.g.*, ISCR Case No. 98-0419 (April 30, 1999) at p. 8 (noting negative security implications of voluntary exercise of dual citizenship).

(c) Security clearance decisions under Executive Order 10865 and the Directive are not loyalty determinations. *See, e.g.*, ISCR Case No. 97-0699 (November 24, 1998) at p. 3. Accordingly, it was arbitrary, capricious, and contrary to law for the Administrative Judge to refer to Applicant's loyalty.

(d) Department Counsel contends the Administrative Judge erred by concluding Applicant's financial interests were not of security concern because the three foreign corporations were not foreign owned. In support of this contention, Department Counsel contends: (i) the Judge misapplied Foreign Influence Mitigating Condition 5; and (ii) the Judge committed a clear error of judgment by taking a narrow view of the evidence to evaluate the security significance of Applicant's financial interests in three businesses in foreign countries.

(i) The Board has already discussed the Administrative Judge's erroneous application of Foreign Influence Mitigating

Condition 5. The Board need not repeat that discussion here.

(ii) The Administrative Judge failed to provide a rational explanation for her conclusion that Applicant's significant financial interests in three businesses owned and operated in three foreign countries did not raise security concerns under Criterion C. Furthermore, the Judge's analysis of Applicant's financial interests in three foreign countries failed to consider the significance of those financial interests in conjunction with Applicant's voluntary procurement and use of an FC 1 passport. The Judge's piecemeal analysis is inconsistent with the requirements of Section F.3. *See, e.g.*, ISCR Case No. 98-0424 (July 16, 1999) at p. 5 (citing Board decisions for proposition that Administrative Judge must consider totality of an applicant's conduct).

(e) Department Counsel contends the Administrative Judge's reasoning is contrary to the plain language of Foreign Influence Disqualifying Condition 8.⁽⁹⁾ The record evidence shows that Applicant has a substantial financial interest in three foreign countries in the form of the three businesses he owns and operates in those countries. Given that evidence, the Administrative Judge had to apply Foreign Influence Disqualifying Condition 8 or give a rational explanation for not doing so. *See, e.g.*, ISCR Case No. 98-0507 (May 17, 1999) at p. 6. The Judge specifically cited Disqualifying Condition 8 in her decision. Furthermore, although the Judge's reasoning contains errors discussed elsewhere in this decision, the Judge did not indicate or suggest that she was ignoring or disregarding Disqualifying Condition 8. Accordingly, Department Counsel's argument fails to demonstrate error by the Judge on this point.

(f) Department Counsel contends the totality of the Administrative Judge's errors warrant reversal. Applicant contends that the Administrative Judge did not err. In the alternative, Applicant argues that, if the Board concludes the Judge erred, the Board should remand the case so the Judge can take further evidence about actions Applicant has taken to renounce his FC 1 citizenship and give up his FC 1 passport.

For the reasons given in this decision, the Board concludes the Administrative Judge committed various errors. The Board declines to grant Applicant the relief he seeks. Applicant had ample opportunity to present evidence under Item 15 of the Additional Procedural Guidance, and he is not entitled to an additional chance to present further evidence to bolster his case. *Cf.* ISCR Case No. 98-0871 (January 29, 1998) at p. 2 (party not entitled to have another hearing so party can present its case once again).

The Board need not decide whether the Administrative Judge's various errors, viewed individually, are harmful. Taken in their entirety, the Judge's errors are harmful and warrant reversal under the particular facts of this case.

Conclusion

Department Counsel has met its burden of demonstrating error that warrants reversal. Accordingly, pursuant to Item 33.c. of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's April 16, 1999 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. Department Counsel does not challenge the Administrative Judge's findings and conclusions about Applicant's family ties (SOR 2.b.). Accordingly, the Board need not address them for purposes of dealing with this appeal.
2. The Administrative Judge's findings are ambiguous to the extent the Judge found Applicant owns two U.S. corporations, but made other findings that refer to a single U.S. corporation or company owned by Applicant. That ambiguity is not relevant to the appeal issues.
3. "[D]ual citizenship is based solely on parents' citizenship or birth in a foreign country."
4. "[A]ctivity is sanctioned by the United States."
5. In other cases that have been appealed, Administrative Judges have applied Foreign Preference Mitigating Condition 3 based on reasoning similar to that used by the Judge in this case. However, the application of Mitigating Condition 3 was not at issue in those appeals. Accordingly, the Board's decisions in those cases did not constitute a ruling by the Board with respect to the meaning or application of Mitigating Condition 3.
6. "[I]ndividual has expressed a willingness to renounce dual citizenship."
7. Contrary to Applicant's contention (Reply Brief at p. 6), Applicant's answer to the SOR does not contain any statement that Applicant is willing to give up his FC 1 passport or renounce his FC 1 citizenship.
8. "[F]oreign financial interests are minimal and not sufficient to affect the individual's security responsibilities."
9. "[A] substantial financial interest in a country, or in any foreign owned or operated business that could make the individual vulnerable to foreign influence."