DATE: May 17, 1999

In Re:

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

Applicant for Security Clearance

ISCR Case No. 98-0507

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Esq., Department Counsel

FOR APPLICANT

James W. Maxfield, Esq.

Administrative Judge Kathryn M. Braeman issued a decision, dated December 23, 1998, 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 improperly placed the burden of proof on Department Counsel with respect to one issue in the case; (2) whether one of the Administrative Judge's factual findings is not supported by the record evidence; (3) whether the Administrative Judge failed to properly apply pertinent provisions of the Adjudicative Guidelines; and (4) 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 August 17, 1998 to Applicant. The SOR was based on Criterion C (Foreign Preference) and Criterion B (Foreign Influence).

A hearing was held on November 16, 1998. The Administrative 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 Department Counsel's appeal from that favorable decision.

Administrative Judge's Findings and Conclusions

Applicant is a 39-year-old man employed by a defense contractor since early 1998.

Applicant was born in the United States. Applicant's family moved to a foreign country (FC) in 1973, when he was fourteen. Applicant went to school in FC and worked in a series of jobs with family-owned businesses in FC until he returned to the United States in late 1995.

Until 1993, Applicant lived in FC with a permanent resident visa. In January 1993, Applicant became a citizen of FC, after he was informed by FC officials that his residency visa would not be renewed and that he could become a citizen of FC. Applicant believed that there was a United States court decision that held it was unconstitutional to require United States citizens to give up their United States citizenship if they became foreign nationals. Applicant became an FC citizen for convenience because he traveled frequently because his family had business in both FC and the United States. Applicant did not think that there would be any repercussions to being an FC citizen. Applicant is now willing to renounce his FC citizenship and surrender his FC passport in order to keep his defense contractor job.

Applicant has an FC and a United States passport. Applicant uses his United States passport when he travels to other countries. He used his FC passport in March 1993 to reenter FC. He would need to use his FC passport to reenter FC in the future because he does not have a permanent residency visa in his United States passport.

Applicant's wife, whom he married in 1988, is an FC citizen. His wife's parents are FC citizens and live in that country. Applicant's parents and two brothers also exercise dual citizenship, and one brother lives in FC. None of his family or his wife's family has any affiliation with the United States government or any foreign government. Applicant has casual, infrequent contacts with his brother who lives in FC. Applicant's only financial interest in FC is some personal belongings he stored there because he could not afford to ship them to the United States.

Any security concerns arising from Applicant's dual citizenship are overcome by his clear statement that he will renounce his FC citizenship and will no longer exercise any rights or privileges of FC citizenship. Applicant's wife and her parents could not exercise foreign influence over him because they have no official ties with the FC government. There is little likelihood that Applicant's parents and brother, who returned to the United States, would exercise foreign influence over him. Applicant's contacts with his brother who lives in FC are casual and infrequent. There is no evidence that Applicant's ties might subject him to duress or create a situation that could result in the compromise of classified information.

Appeal Issues[(1)]

1. Whether the Administrative Judge improperly placed the burden of proof on Department Counsel with respect to one issue in the case. Department Counsel contends the Administrative Judge improperly placed the burden of proof on Department Counsel to produce evidence showing that Applicant was vulnerable to duress or undue influence. In support of this contention, Department Counsel argues: (a) Department Counsel's burden of proof was satisfied because Applicant admitted the SOR allegations; (b) nothing in the Directive requires Department Counsel to present evidence that Applicant's foreign ties made him vulnerable to duress or undue influence; and (c) the Judge's reasoning was inconsistent with the principles that direct or objective evidence of nexus is not required, and that the government need not wait until an applicant mishandles or fails to properly safeguard classified information before it can deny or revoke access to classified information. For the reasons that follow, the Board concludes Department Counsel's arguments fail to demonstrate the Judge erred.[(2)]

A corollary of Department Counsel's obligation to prove controverted SOR allegations (Directive, Additional Procedural Guidance, Item 14) is the proposition that Department Counsel is not obligated to prove uncontroverted allegations. However, the mere fact that an applicant admits an SOR allegation does not preclude an Administrative Judge from considering whether the uncontroverted fact has security significance. For example, drawing an adverse security inference is not appropriate merely because an applicant admits he used a foreign passport before he became a naturalized United States citizen. *See, e.g.*, ISCR Case No. 97-0356 (April 21, 1998) at p. 4 (explaining use of foreign passport and voting in foreign elections before applicant became a naturalized United States citizen was not an exercise of dual citizenship).

Department Counsel correctly notes that there is no general obligation that the government prove that an applicant is vulnerable to coercion or undue influence before it can deny or revoke a security clearance for that applicant. *See, e.g.*, ISCR Case No. 96-0371 (June 3, 1997) at p. 3 ("Moreover, an adverse security clearance decision can be based on an applicant's conduct or present circumstances that have security significance independent of any coercion or blackmail possibilities."). However, Department Counsel's argument fails to the extent it seeks to apply that general proposition to Criterion B (Foreign Influence) without consideration of the language of that Criterion. *Cf.* ISCR Case No. 98-0320

(April 8, 1999) at p. 3 (general principles do not supersede a provision of law that specifically covers an issue in a case). A reading of Criterion B in the Directive (Enclosure 2 at page 2-6 and 2-7) clearly indicates that the government's security concerns under that Criterion are based on considerations of an applicant's possible vulnerability to coercion or undue influence because of contacts or ties with foreign countries. In a case involving Criterion B, Department Counsel need not present direct or objective evidence that affirmatively proves the applicant is vulnerable to coercion or undue influence,[(3)] but it does need to present evidence that demonstrates the applicant has engaged in conduct or is in a situation that, as a matter of common sense (Directive, Section F.3.) raises the kinds of security concerns covered by Criterion B.

Department Counsel correctly notes that, in general, the government need not wait until an applicant mishandles or fails to properly safeguard classified information before it can deny or revoke access to classified information. However, Department Counsel's argument cites that general proposition out of context, ignoring important language the Board has used in connection with it:

"All that is necessary is proof of fact and circumstances that indicate that an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information." ISCR Case No. 98-0448 (April 19, 1999) at p. 3. *See also* ISCR Case No. 97-0440 (November 23, 1998) at p. 5; ISCR Case 96-0641 (December 31, 1997) at p. 4-5.

"All that it required is evidence that would allow an Administrative Judge to draw a reasonable inference that an applicant's conduct or circumstances pose a security risk." ISCR Case No. 97-0752 (December 4, 1998) at p. 4. *See also* ISCR Case No. 96-0825 (November 18, 1997) at pp. 2-3.

Department Counsel's argument on this point would be plausible *if* the Administrative Judge had based her favorable decision on the absence of any evidence that Applicant had committed a security violation. However, the Judge did not state, indicate or suggest any such rationale for her favorable decision. Accordingly, Department Counsel's argument is groundless in this case.

2. Whether one of the Administrative Judge's factual findings is not supported by the record evidence. The Administrative Judge found that Applicant became a citizen of FC after he learned that there was a United States court decision that it was unconstitutional to require United States citizens to give up their United States citizenship if they became foreign nationals.[(4)] Department Counsel contends that finding is not supported by the record evidence. In support of that contention, Department Counsel argues: (a) Applicant did not cite any federal court decision or ask the Judge to take administrative notice of any U.S. court decision; and (b) Applicant's statement on the point is based on his recollection of an uncorroborated third-party statement, which is insufficient to support the Judge's finding.[(5)] For the reasons that follow, the Board concludes Department Counsel has failed to demonstrate the Judge's finding constitutes error.

First, an applicant need not cite any federal court decision or ask the Administrative Judge to take administrative notice of any federal court decision. It is untenable for Department Counsel to argue that an Administrative Judge cannot take notice of any pertinent federal court decision. Neither an Administrative Judge nor this Board is precluded from considering a pertinent federal court decision merely because neither party cites to it nor asks that administrative notice be taken of it. *But see* ISCR Case No. 98-0419 (April 30, 1999) at pp. 6-7 (explaining exception to general rule in cases where government alleges applicant engaged in criminal conduct in absence of a criminal conviction).

Second, Applicant's statement goes to his state of mind, not to the legal correctness of his beliefs. Whether Applicant's statement is legally correct[(6)] is immaterial to its relevance to assessing his state of mind when he decided to become an FC citizen.[(7)] As Applicant notes in his reply brief, there is no legal requirement that an applicant cite case law in order to testify about his motivations or state of mind. Accordingly, harmful error is not demonstrated even if Applicant's statement was based on his reliance on an uncorroborated third party statement about a legal matter.

3. Whether the Administrative Judge failed to properly apply pertinent provisions of the Adjudicative Guidelines. Department Counsel contends the Administrative Judge failed to properly apply pertinent provisions of the Adjudicative

Guidelines because: (a) the Administrative Judge did not properly evaluate the likelihood Applicant would continue to engage in his conduct; (b) the record evidence does not support the Judge's application of Foreign Preference Mitigating Condition 4; (c) the Judge improperly applied Foreign Influence Mitigating Condition 3; (d) the Judge improperly applied Foreign Influence Mitigating Condition 5; and (e) the Judge did not provide an explanation for her deviations from the Adjudicative Guidelines.

An Administrative Judge must apply pertinent provisions of the Adjudicative Guidelines. Directive, Section F.3. *See, e.g.*, ISCR Case No. 98-0380 (March 8, 1999) at p. 3. Although a Judge has the discretion to deviate from the literal language of pertinent Adjudicative Guidelines, the Judge must articulate a rational basis for doing so. *See, e.g.*, ISCR Case No. 97-0825 (January 7, 1999) at p. 3; ISCR Case No. 97-0803 (June 19, 1998) at p. 2. Furthermore, the mere presence or absence of Adjudicative Guidelines for or against clearance is not solely dispositive of a case. *See, e.g.*, ISCR Case No. 97-0765 (December 1, 1998) at p. 6; ISCR Case No. 98-0111 (November 13, 1998) at p. 4. The Board will consider Department Counsel's appeal arguments in light of these legal principles.

(a) Likelihood of recurrence. Department Counsel contends the Administrative Judge failed to properly evaluate the likelihood Applicant would continue to engage in the exercise of dual citizenship because the Judge ignored the record evidence that Applicant might use his FC passport in the future. This contention overlaps Department Counsel's argument concerning Foreign Preference Mitigating Condition 4 and will be considered along with that argument.

(b) Foreign Preference Mitigating Condition 4.[(8)] Department Counsel contends the record evidence does not support the Administrative Judge's application of Foreign Preference Mitigating Condition 4. This contention has merit.

Department Counsel correctly notes that there is conflicting record evidence on whether Applicant is willing to renounce his FC citizenship and give up his FC passport. The presence of such conflicting record evidence does not reduce the Administrative Judge's responsibility as trier of fact to weigh the evidence and make factual findings. *See, e.g.*, ISCR Case No. 97-0630 (May 28, 1998) at p. 2. Indeed, the Judge often must weigh conflicting record evidence and decide which evidence is more credible or persuasive in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 95-0576 (May 7, 1996) at p. 3. However, the presence of such conflicting evidence requires the Judge to carefully consider the record evidence as a whole and weigh it in a reasonable manner. *See* Directive, Additional Procedural Guidance, Item 32.a. ("The Appeal Board shall . . . determine whether or not: a. The 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*.")(emphasis added).

An applicant's stated intentions concerning retention or renunciation of foreign citizenship constitute relevant and material evidence. However, such stated intentions are not dispositive. Such statements of intent must be evaluated in light of the record evidence as a whole to determine whether they are consistent with an applicant's conduct. *See, e.g., Vance v. Terrazas*, 444 U.S. 252, 260 (1980)(noting intent can be expressed in words or "found as a fair inference from proved conduct"); *Sadat v. Mertes*, 615 F.2d 1176, 1181 (7th Cir. 1980)(noting person's statements about his domicile had to be evaluated in light of evidence of person's conduct). *Cf.* DISCR Case No. 90-0239 (February 23, 1994) at p. 6 (applicant's denial of intent to conceal material facts is relevant evidence, but not conclusive, and must be considered in light of all the record evidence). Furthermore, any recent statements by an applicant about his or her intentions concerning retention or renunciation of foreign citizenship must be considered in light of any earlier statements by an applicant, especially prior inconsistent ones. Given the conflicting record evidence about Applicant's intentions, it was arbitrary and capricious for the Administrative Judge to conclude that Applicant "clearly states" his intention to renounce FC citizenship and give up his FC passport. The overall evidence on Applicant's willingness to renounce his FC citizenship and give up his FC passport is neither clear nor unequivocal. Furthermore, the Judge's conclusion is arbitrary and capricious because it conflicts with the Judge's finding that Applicant would need to use his FC passport to reenter FC.

Applicant argues that the Adjudicative Guidelines do not require applicants to relinquish dual citizenship or surrender foreign passports prior to a hearing. Applicant is correct, but his argument is misplaced. The purpose of the Directive is to provide procedural and substantive guidance on the adjudication of security clearance cases, including informing applicants and security adjudicators as to the kinds of conduct or circumstances that may have security significance. The right of applicants to make choices in life does not preclude the government from considering the security significance

of an applicant's choices or the situations and circumstances that applicants find themselves in as a result of their choices. Even if an applicant chooses to engage in conduct or place himself or herself in a situation that is legally available, the government is not precluded from deciding whether the applicant's choice has security significance. *See, e.g., Gayer v. Schlesinger*, 490 F.2d 740, 752-54 (D.C. Cir. 1973)(government entitled to deny security clearance to applicant who refused to provide information based on claim of privacy); *Clifford v. Shoultz*, 413 F.2d 868 (9th Cir. 1969) (government could suspend applicant's security clearance based on his refusal to answer questions based on claim of constitutional privilege), *cert. denied*, 396 U.S. 962 (1969); ISCR Case No. 98-0349 (February 3, 1999) at p. 3 (neither filing for bankruptcy nor discharge of debts in bankruptcy precludes consideration of security significance of applicant's financial problems). Therefore, the fact that Applicant has the right to decide whether to relinquish his FC citizenship and his FC passport (and if so when) does not preclude the government from considering the security significance of his decision.

(c) Foreign Influence Mitigating Condition 3.[(9)] Department Counsel argues: (a) the Administrative Judge erred by applying Foreign Influence Mitigating Condition 3 because it cannot be applied in a case where the applicant's foreign contacts are family members; and (b) the Judge's decision not to apply Foreign Influence Mitigating Condition 1[(10)] was outcome determinative.

Nothing in the plain language of Foreign Influence Mitigating Condition 3 precludes its application when the foreign citizens in question are immediate family members, a cohabitant, or associates of an applicant. Department Counsel's argument to the contrary is not persuasive. *See* ISCR Case No. 98-0592 (May 4, 1999) at p. 7.

It is untenable for Department Counsel to contend that the Administrative Judge's decision not to apply Foreign Influence itigating Condition 1 would require, as a matter of law, an adverse decision in this case. As discussed earlier in this decision, the mere presence or absence of an Adjudicative Guideline for or against clearance is not solely dispositive of a case.

(d) Foreign Influence Mitigating Condition 5.[(11)] Department Counsel contends it was arbitrary and capricious for the Administrative Judge to apply Foreign Influence Mitigating Condition 5 because: (1) the government's case against Applicant was not based on his having financial interests in FC; and (2) the Judge's reasoning was based on a non sequitur. This contention has mixed merit.

The SOR did not allege, and Department Counsel did not seek to prove, that Applicant had financial interests in FC. However, there was record evidence that Applicant had some personal belongings stored in FC. Given that record evidence, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to consider whether Foreign Influence Mitigating Condition 5 should be applied. *See* Directive, Section F.3. Indeed, Department Counsel essentially concedes the point in a footnote that states "Department Counsel is not arguing that the amount of an applicant's foreign financial interests is not relevant information under the Directive's 'whole person' concept."

However, nothing in the record evidence of this case provides a rational basis for the Administrative Judge to conclude there was any factual or logical connection between the nature and strength of Applicant's family ties with FC citizens and the value of his personal belongings in storage in FC. Accordingly, it was arbitrary and capricious for the Judge to reason that the security concerns raised by Applicant's family ties with FC citizens "are mitigated by the fact that Applicant's foreign financial interests are minimal and not sufficient to affect [his] security responsibilities as they are confined to items in a storage locker."

(e) Deviations from Adjudicative Guidelines. As discussed earlier in this decision, Department Counsel has failed to demonstrate the Judge erred in her application of Foreign Influence Mitigating Condition 3, but has demonstrated the Judge erred in her application of Foreign Preference Mitigating Condition 4 and Foreign Influence Mitigating Condition 5. However, the errors of the Judge demonstrated by Department Counsel do not involve any attempted deviations from the language of the pertinent Adjudicative Guidelines. Accordingly, this argument adds nothing to support the merits of Department Counsel's appeal.

4. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Department Counsel makes several arguments in support of its contention that the Administrative Judge's decision is arbitrary, capricious, or

contrary to law: (a) the Judge erred by focusing on the legal status of Applicant's dual citizenship instead of focusing on the security significance of Applicant's voluntary procurement of FC citizenship; (b) the record evidence does not support the Judge's conclusion that Applicant has demonstrated his preference for the United States; (c) the Judge's rationale for clearing Applicant with respect to Criterion B is implausible, reflects a clear error of judgment, and fails to consider an important aspect of the case; and (d) the totality of the Judge's errors warrants reversal, or in the alternative, remand.

(a) Legal status of Applicant's dual citizenship. Department Counsel's argument on this point has mixed merit. A close reading of the Administrative Judge's decision shows she did not do quite what Department Counsel claims she did. The Judge stated --- in connection with Applicant's use of an FC passport --- that "[c]onduct potentially indicative of foreign preference may still be of security concern despite its legality if it increases the risk of an individual making decisions influenced by needs, desires, or aims of a foreign nation." Later in the same paragraph, the Judge referred to statements Applicant claims were made to him by United States embassy personnel[(12)] and FC government officials. However, the Judge did so in connection with the Judge's consideration of Applicant's state of mind when he decided to become an FC citizen, not the legality of Applicant's decision. Accordingly, Department Counsel's argument lacks merit to the extent it is based on the contention that the Administrative Judge relied on the legality of Applicant's conduct to reach favorable conclusions about Applicant's security eligibility.

Department Counsel's argument has merit to the extent it contends the Administrative Judge failed to give due consideration to the security significance of Applicant's voluntary procurement of FC citizenship. The exercise of dual citizenship places a person in a position of being subject to duties or obligations owed to two different countries, which could subject the person to competing or conflicting claims. *See* ISCR Case No. 98-0419 (April 30, 1999) at p. 8. A person who voluntarily obtains the citizenship of a foreign country as an adult is taking an action that is fraught with serious implications for the person's allegiance, duties, and obligations. Those implications, in turn, raise serious questions about the person's security eligibility. An applicant faced with competing claims from two different countries based on citizenship in those countries may confront the dilemma of how to reconcile those competing claims and still faithfully fulfill the fiduciary obligations associated with being granted a security clearance. Accordingly, an applicant who, as an adult, voluntarily assumes the responsibilities of foreign citizenship has a heavier burden to overcome than does someone who has foreign citizenship by birth.[(13)]

(b) Applicant's preference for United States. Department Counsel contends the record evidence runs contrary to the Administrative Judge's finding that Applicant has demonstrated a preference for the United States. Department Counsel argues the record evidence shows Applicant has expressed only a conditional intention of renouncing his FC citizenship and giving up his FC passport, and that Applicant's conditional intention is more indicative of his preference to keep his job with a defense contractor than a preference for the United States over FC.

As discussed earlier in this decision, the Administrative Judge erred by concluding that Applicant "clearly states" his intention to renounce FC citizenship and give up his FC passport. Because that erroneous conclusion was pivotal to the Judge's analysis under Criterion C, the Board cannot sustain the Judge's favorable formal findings under Criterion C.

(c) Administrative Judge's rationale concerning foreign influence. The Administrative Judge concluded Applicant's family ties in FC did not warrant adverse formal findings under Criterion B because: (1) his family members who are FC citizens could not exercise foreign influence on Applicant because they have no official ties with the FC government; and (2) Applicant's financial interests in FC do not make him vulnerable to coercion or undue influence. Department Counsel contends the Judge's reasoning is arbitrary and capricious because it ignores the possibility that foreign influence could be exercised by a foreign government over an applicant through pressure on the applicant's family members located in the foreign country.[(14)]

The mere possession of family ties with persons in a foreign country is not, as a matter of law, disqualifying under Criterion B. The language of Criterion B (Foreign Influence) in the Adjudicative Guidelines makes clear that the possession of such family ties *may* pose a security risk. Whether an applicant's family ties in a foreign country pose a security risk depends on a common sense evaluation of the overall facts and circumstances of those family ties. *See* ISCR Case No. 98-0419 (April 30, 1999) at p. 5.

The security significance of an applicant's family ties in a foreign country does not turn on the simple question of whether the applicant's relatives have official ties with a foreign government. Some foreign family ties can have security significance even where the family member is not a member of a foreign government. (By the same token it cannot be stated that all family ties to a foreign government are disqualifying.) Department Counsel is correct in noting that foreign influence can be brought to bear on an applicant even if the applicant's family members have no official ties with a foreign government. *Cf. Scarbeck v. United States*, 317 F.2d 546, 548-49 (D.C. Cir. 1963)(defendant pressured to work for foreign intelligence service through threats made against defendant's foreign paramour), *cert. denied*, 374 U.S. 856 (1963). Indeed, human experience shows that a person may be subjected to coercion or undue influence when a third party (*e.g.*, police state, terrorist, kidnapper, or criminal seeking to intimidate a potential witness) brings pressure to bear on, or makes threats against, the family members of the person who is the ultimate target.[(15)] Furthermore, even in the absence of coercion being brought to bear on family members in a foreign country,[(16)] some family ties may have security significance because of the particular facts and circumstances involved (*e.g.*, family member is an officer or employee of a foreign company that engages in industrial espionage or deals in military technology). These examples are not exhaustive, but merely illustrative, and show that the security significance of family ties in a foreign country cannot be evaluated in a simplistic manner. The Administrative Judge must consider all the facts and circumstances of an applicant's case, including the form of government and the nature of the foreign family's ties, interests and vulnerabilities.

Department Counsel has not demonstrated that the record evidence in this case required the Administrative Judge to find Applicant's family ties in FC posed an unacceptable security risk. However, Department Counsel has persuasively argued that it was arbitrary and capricious for the Judge to conclude Applicant's family members who are FC citizens could not exercise foreign influence on Applicant solely because they have no official ties with the FC government.

(d) Totality of Administrative Judge's errors. Department Counsel contends the totality of the Administrative Judge's errors warrant reversal, or in the alternative, remand. The Board need not decide whether the Judge's various errors, standing alone, are harmful. Taken in their totality, the Judge's errors are harmful and precluding an affirmation of the Judge's favorable security clearance decision.

The Administrative Judge's sustainable findings about the facts and circumstances of Applicant's conduct and situation raise serious questions about his security eligibility. Applicant had the burden of presenting evidence of extenuation, mitigation or changed circumstances sufficient to warrant a conclusion that it is clearly consistent with the national interest to grant or continue a security clearance for him. Directive, Additional Procedural Guidance, Item 15. Given the clearly consistent with the national interest standard, that burden is a heavy one. The Judge's errors fatally undercut her findings of extenuation and mitigation. Absent sustainable findings of extenuation or mitigation, the Judge did not have a rational basis for her conclusion that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Conclusion

Department Counsel has met its burden of demonstrating harmful error. Pursuant to Item 33.c. of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's December 23, 1998 decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

See concurring opinion

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Concurring Opinion of Administrative Judge Michael Y. Ra'anan

While I concur with the majority as to the rest of the opinion, I disassociate myself from the paragraph that purports to address Applicant's argument that the Adjudicative Guidelines do not require him to surrender his foreign citizenship. Applicant's point is not frivolous, even if it is unpersuasive as to the ultimate disposition of the case. Applicant is not asserting that the Department of Defense may not consider the security significance of his legal behavior. He is asserting that he is qualified for a clearance if he has met the letter of the Directive. Applicant's argument is not persuasive in this case.

The Directive does not require renunciation of dual citizenship. It does however specify that the exercise of dual citizenship is a condition which may be disqualifying. It also specifies that an expressed willingness to renounce dual citizenship is a mitigating factor. Thus, Applicant's case history of acquiring FC citizenship as an adult and not renouncing that citizenship is a pertinent issue. The Board has said repeatedly, however, that the presence or absence of specific disqualifying or mitigating conditions is not dispositive. Ultimately, the decision must consider the whole person.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. Both parties cite to Administrative Judge decisions to support their appeal arguments. (The Board notes Applicant's reply brief erroneously identifies some DOHA Judge decisions as Board decisions.) A party is free to cite a Judge's decision as persuasive authority. However, an appellate tribunal is not bound by decisions issued by subordinate tribunals. Thus the Board is not bound by decisions made by DOHA Judges. The Board need not reconcile its rulings in this or any other case with rulings made by DOHA Judges.

2. Applicant argues the Supreme Court's decision in *Department of Navy v. Egan*, 484 U.S. 518 (1988) should be limited to the specific statute and agency regulations addressed in that case. Applicant's argument fails because the lower federal courts have applied the *Egan* decision broadly, not narrowly, in cases involving security clearance decisions. *See, e.g., Becerra v. Dalton*, 94 F.3d 145 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 1087 (1997); *Brazil v. United States Department of Navy*, 66 F.3d 193 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 1317 (1996); *Beattie v. Boeing Co.*, 43 F.3d 559 (10th Cir. 1994), *cert. denied*, 514 U.S. 1127 (1995); *Guillot v. Garrett*, 970 F.2d 1320 (4th Cir. 1992); *Dorfmont v. Brown*, 913 F.2d 1399 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991).

3. *See, e.g.*, ISCR Case No. 97-0752 (December 4, 1998) at p. 4 (government need not show that an applicant presents a "clear and present danger" to security)(citing *Smith v. Schlesinger*, 513 F.2d 462, 476 n.48 (D.C. Cir. 1975)).

4. Applicant asserts he was "almost coerced or placed in the position where he was forced to acquire [FC] citizenship in order to maintain his residency" (Reply Brief at p. 17). The record evidence simply does not support that assertion.

5. Department Counsel also argues, in the alternative, that if the Board concludes the Administrative Judge's finding is sustainable, the Judge erred by focusing on the legal status of Applicant's dual citizenship instead of the security significance of Applicant's voluntary procurement of FC citizenship. Department Counsel's alternative argument will be discussed later in this decision.

6. A discussion of the law concerning the effect of expatriating acts on a person's United States citizenship can be found in *Vance v. Terrazas*, 444 U.S. 252 (1980).

7. An applicant's motivation for acting is a relevant factor to be considered. *See* Directive, Section F.3.d.

8. "[I]ndividual has expressed a willingness to renounce dual citizenship."

9. "[C]ontact and correspondence with foreign citizens are casual and infrequent."

10. "[A] determination that the immediate family member(s), cohabitant, or associate(s) in question would not constitute an unacceptable security risk."

11. "[F]oreign financial interests are minimal and not sufficient to affect the individual's security responsibilities."

12. There is no record evidence that the unnamed United States embassy personnel referred to by Applicant had any authority to make any statements, promises, or commitments about Applicant's security eligibility. Furthermore, since Applicant's security eligibility did not arise until early 1998 (when Applicant began working for defense contractor), it is improbable that Applicant's security eligibility was considered or even addressed by the unnamed United States embassy personnel around 1993 (when Applicant became an FC citizen). Whatever assurances Applicant received that obtaining FC citizenship would not affect his United States citizenship, those assurances are irrelevant to his security eligibility.

13. The Directive recognizes that obtaining dual citizenship solely through one's parents or by birth can be mitigating. Foreign Preference Mitigating Condition 1.

14. Because the Administrative Judge's reasoning concerning the absence of vulnerability to coercion or undue influence with respect to Applicant's financial interests in FC is not challenged by Department Counsel, the Board need not address it other than to note its earlier discussion of the Judge's application of Foreign Influence Mitigating Condition 5.

15. The Board is not persuaded by Applicant's contention that Department Counsel's argument is based on total speculation. Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. *See, e.g.*, ISCR Case No. 98-0625 (March 17, 1999) at p. 6 (citing *Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988)). *See also* footnote 3 of this decision.

16. Undue influence is not limited to coercion or blackmail. "It includes situations where a person is vulnerable to influence, however subtle or noncoercive, that could be exploited to induce a person to act in a manner that is inconsistent with the national security interests of the United States." ISCR Case No. 98-0265 (March 17, 1999) at p. 3.