

DATE: February 16, 2000

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 99-0254

## APPEAL BOARD DECISION AND REVERSAL ORDER

### APPEARANCES

#### FOR GOVERNMENT

Matthew E. Malone, Esq., Department Counsel

#### FOR APPLICANT

*Pro Se*

Administrative Judge John G. Metz, Jr., issued a decision, dated September 9, 1999, in which he 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 imposed an improper burden of proof on Department Counsel; and (2) whether the Administrative Judge's decision with respect to Criterion C was arbitrary, capricious, or contrary to law.

#### Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated May 4, 1999. The SOR was based on Criterion B (Foreign Influence) and Criterion C (Foreign Preference). The Administrative Judge issued a written decision, dated September 9, 1999, in which he 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 the Administrative Judge's favorable security clearance decision.

#### Appeal Issues <sup>(1)</sup>

1. Whether the Administrative Judge imposed an improper burden of proof on Department Counsel. The Administrative Judge found: (a) in January 1997, Applicant applied for citizenship in a foreign country (FC) based on his ancestry; (b) Applicant became an FC citizen in July 1997; (c) Applicant obtained an FC passport in August 1997; and (d) Applicant used the FC passport once in approximately March 1998 when entering a neighboring country from FC. The Administrative Judge found Applicant exercised dual citizenship by applying for and obtaining FC citizenship and obtaining and using an FC passport, but concluded that the government failed to demonstrate Applicant's conduct

demonstrates a foreign preference because "Applicant engaged in the potentially disqualifying conduct as a celebration of his ethnic heritage with no intent to disavow or abandon his preference for his U.S. citizenship."

Department Counsel contends the Administrative Judge erred by imposing an improper burden of proof on Department Counsel under Criterion C. In support of this contention, Department Counsel argues that: (a) the Judge's analysis fails to give due consideration to the Adjudicative Guidelines pertaining to Criterion C; (b) the Judge erred by not following the provision of the Directive that shifts the burden of persuasion to an applicant once SOR allegations have been admitted or proven; (c) there is no requirement under Criterion C that an applicant disavow a preference for his or her U.S. citizenship; and (d) Department Counsel proved Applicant engaged in conduct that is indicative of foreign preference under Criterion C.

Department Counsel's one-sentence argument about the Adjudicative Guidelines pertaining to Criterion C fails to identify how the Administrative Judge supposedly failed to give due consideration to those guidelines. The Board need not address appeal arguments that merely assert a Judge erred without identifying how the Judge supposedly erred. *See, e.g.*, ISCR Case No. 94-0954 (October 16, 1995) at p. 8 (appealing party has burden of raising appeal issues with specificity).

In this case, Applicant's conduct (*i.e.*, obtaining FC citizenship, and obtaining and using an FC passport) demonstrated Applicant exercised dual citizenship within the meaning of Criterion C. Accordingly, the burden of proof shifted to Applicant to demonstrate it is clearly consistent with the national interest to grant or continue a security clearance for him. *See* Directive, Additional Procedural Guidance, Item 15 ("The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."). Although Department Counsel persuasively demonstrates the Judge committed other errors in this case, Department Counsel has failed to articulate a cogent argument on how the Judge supposedly acted in violation of Item 15 of the Additional Procedural Guidance.

Department Counsel is correct in noting there is no requirement under Criterion C that the government must prove an applicant has affirmatively disavowed a preference for his or her U.S. citizenship. Although such evidence would be indicative of a foreign preference under Criterion B, it is not the only way that an applicant may demonstrate a foreign preference. Accordingly, the fact there is no record evidence that Applicant has affirmatively disavowed his preference for U.S. citizenship did not relieve the Administrative Judge from his obligation to evaluate the security significance of Applicant's proven exercise of dual citizenship under Criterion C.

Department Counsel's remaining arguments are variations of its arguments under the second appeal issue. Those arguments will be considered when the Board addresses the second appeal issue.

2. Whether the Administrative Judge's decision with respect to Criterion C was arbitrary, capricious, or contrary to law. Department Counsel contends the Administrative Judge's favorable conclusions under Criterion C are arbitrary, capricious, or contrary to law because: (a) the Judge gave undue weight to Applicant's conditional offer to renounce his FC citizenship and, therefore, erred in his application of Foreign Preference Mitigating Condition 4<sup>(2)</sup>; (b) the Judge erred by basing his favorable conclusions under Criterion C on his observation that Applicant did not engage in other types of disqualifying conduct under Criterion C; (c) the Judge gave undue weight to Applicant's statements about his motivation in obtaining FC citizenship and an FC passport; and (d) the Judge failed to give due consideration to the security implications of Applicant's conduct.

Department Counsel correctly notes that Applicant's proffer to renounce his FC citizenship and give up his FC passport is a conditional one. Such a conditional offer to renounce foreign citizenship is not entitled to be given the same weight as an unconditional offer and reduces the weight that the Administrative Judge reasonably could give to Foreign Preference Mitigating Condition 4. *See, e.g.*, ISCR Case No. 98-0252 (September 15, 1999) at p. 7.

It was arbitrary and capricious for the Administrative Judge to conclude Applicant's conduct did not have negative security significance under Criterion C because Applicant did not engage in other types of conduct that may have greater negative security significance. Even if an applicant has not engaged in other conduct that has more serious

negative security significance, the Judge still has the obligation to evaluate the security significance of the conduct the applicant did engage in. *See, e.g.*, ISCR Case No. 98-0476 (December 14, 1999) at p. 4.

It was proper for the Administrative Judge to consider Applicant's motivation in obtaining FC citizenship and an FC passport. *See* Directive, Section F.3.d. However, the fact an applicant has indicated he or she is acting based on personal reasons that do not suggest a sinister motive does not mean that the applicant's actions lack negative security significance. *See, e.g.*, ISCR Case No. 98-0476 (December 14, 1999) at p. 5 ("Applicant may be motivated by his personal financial interests, but the personal nature of his motivation does not negate or diminish the security significance of Applicant's interest in retaining [foreign country] citizenship."); ISCR Case No. 98-0252 (September 15, 1999) at p. 8 ("The Judge acted in an arbitrary and capricious manner by giving reduced weight to the significance of Applicant's procurement and use of a [foreign country] 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 a [foreign country] passport."). Accordingly, the Judge gave undue weight to his conclusion that Applicant was motivated by his "celebration of his ethnic heritage." The Judge failed to take into account the record evidence that Applicant did more than merely celebrate his ethnic heritage. Applicant affirmatively sought and obtained FC citizenship and obtained and used an FC passport. Such conduct clearly falls within the scope of Criterion C and has negative security implications. *See, e.g.*, ISCR Case No. 98-0331 (May 26, 1999) at p. 7 (discussing significance of person voluntarily obtaining citizenship of a foreign country).

### **Conclusion**

Department Counsel has met its burden on appeal of demonstrating harmful error below. Considering the record as a whole in this case, the totality of the Administrative Judge's errors warrants reversal. Accordingly, pursuant to Item 33.c. of the Directive's Additional Procedural Guidance, the Board reverses the Judge's September 9, 1999 decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

### **Concurring Opinion of Administrative Judge Michael Y. Ra'anan**

I found the case before the Board unusually difficult. Applicant has a very strong personal history as a Vietnam veteran and a US civil servant. I do not believe Applicant's foreign relatives constitute a threat. I understood his statement that he is willing to renounce his foreign country citizenship "to overcome this security concern" as a statement explaining his motivation and his desire to accommodate the government's concern regarding his dual citizenship. I was willing to conclude that his decision to seek foreign country citizenship as a way of celebrating his ethnic heritage, while certainly not to be encouraged, could be excused as a harmless eccentricity given the totality of this case.

However, there is one fact I could not conclude was mitigated on this record. Applicant used his foreign country passport to enter a third country in March of 1998. Applicant's use of his of his foreign country passport to enter the issuing country might be mitigated under some circumstances. But I do not see how his use of the foreign passport to enter a third country can be mitigated. Applicant's explanation for this conduct (that it makes travel easier and faster) amounts to convenience which is not an extension of his ethnic heritage. When a person decides to use a passport from a

foreign country to enter a third country then that person is consciously announcing himself to the third country's authorities as a citizen of the issuing country and not the US. To make such a serious decision for convenience is a significant commentary.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings for Applicant under Criterion B. Those formal findings are not at issue on appeal.
2. "[I]ndividual has expressed a willingness to renounce dual citizenship."