

DATE: October 20, 2000

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0295

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Arthur A. Elkins, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Elizabeth M. Matchinski issued a decision, dated November 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 certain factual findings by the Administrative Judge are erroneous; and (2) whether the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of

Reasons (SOR) dated May 7, 1999. The SOR was based on Criterion C (Foreign Preference) and Criterion B (Foreign Influence). A hearing was held on September 10, 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 the Judge's favorable security clearance decision.

On March 22, 2000, the Director, DOHA, issued an e-mail message that read "Effective immediately and until further notice there is an across the board moratorium on the issuance of any decisions in cases involving any dual citizenship issues. This applies to actions by security specialists, Department Counsel, Administrative Judges, and the Appeal Board." On April 11, 2000, the Director, DOHA issued an e-mail message that read "This is to provide further guidance as to the moratorium on dual citizenship cases issued on Wednesday March 22nd. Effective immediately the moratorium applies only to decisions to clear or issue an SOR by a security specialist, decisions to clear or deny by an Administrative Judge and decisions to affirm, reverse or remand by the Appeal Board in cases involving an Applicant's use and/or possession of a foreign passport." Copies of the March 22 and April 11, 2000 e-mail messages were provided

to Applicant and the processing of this appeal was held in abeyance.

By letter dated September 1, 2000, the Board informed the parties that the Deputy General Counsel (Legal Counsel) had (1) provided the Board with a copy of an August 16, 2000 memorandum by the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASDC3I) entitled "Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline" (hereinafter "ASDC3I memo"), and (2) advised the Board that the moratorium imposed on March 22, 2000 had been lifted. A copy of the ASDC3I memo was provided to the parties with the September 1, 2000 letter.

Through the September 1, 2000 letter, the Board also gave both parties the opportunity to: (1) express their views on the ASDC3I memo and how it applies to this case; and (2) to respond to the other party's submission. Department Counsel made a submission on September 11, 2000, in which it contended that the ASDC3I memo should be applied to this case. The Board received no submission from Applicant concerning either the ASDC3I memo or Department Counsel's September 11, 2000 submission about the ASDC3I memo. By letter dated October 2, 2000, the Board advised the parties that each had been given the opportunity to respond to the September 1, 2000 and that no further submissions would be accepted by the Board.

Statement of Case

The Administrative Judge made extensive findings of fact. This statement of the case is a summary of facts to provide a general background for this appeal. Other pertinent facts will be discussed when the Board addresses the various appeal issues.

Applicant is a United States citizen by birth. When Applicant was two years old, his parents emigrated to a foreign country (FC). Applicant was granted FC citizenship by virtue of his parents becoming FC citizens.

Applicant was raised and educated in FC. Upon graduation from high school, Applicant was drafted into the FC military and performed compulsory military service for 36 months and was in FC's military reserves until December 1994.

During the 1987-1989 time frame, Applicant traveled abroad extensively. In 1988, Applicant visited his relatives in the United States. After working his way across the United States, he left the United States in 1989 to travel in the Far East. On those trips, Applicant used his United States passport with one exception: he used his FC passport to enter one country because the cost of entering that country on his United States passport was too high for his limited budget.

In 1989, Applicant returned to FC to get an undergraduate education because the cost was significantly lower than in the United States. In 1994, Applicant earned two bachelor degrees in FC.

In 1993, Applicant married an FC citizen. In January 1995, Applicant came to the United States to pursue graduate studies, which were funded through a United States government program. Applicant's FC spouse was admitted to the United States as a permanent resident alien, and she later obtained United States citizenship. Applicant has two minor children who are dual citizens of the United States and FC and who have passports from both countries.

Applicant traveled outside the United States to another country (other than FC) in connection with his graduate studies. From late 1995 to early 1996, Applicant and his spouse took a vacation in another country (other than FC). Applicant traveled to FC in September 1996, March 1997, June 1997, and May 1999 to see family members. Applicant has used his United States passport when traveling abroad, except that he presents his FC passport when entering FC based on his understanding that he is compelled by FC law to do so.

Applicant's parents and siblings are all dual citizens of the United States and FC and they reside in FC. Applicant contacts them by telephone every few weeks and sends them gifts on their birthdays. Applicant's father is a businessman in FC with significant business ties in the United States, and he visits Applicant on his trips to the United States. None of Applicant's family members holds a government position in FC. Applicant has a 19-year-old sibling who is currently performing compulsory military service in FC. Applicant's other siblings currently are: a language specialist; a lawyer with a private law firm; a university student; and a high school student.

Applicant became involved in a non-classified scientific project funded by a U.S. military office. Applicant recognized military implications to his work and demonstrated this point through experiments to his grant monitors. His work was determined to be of a classified nature and Applicant was requested to obtain a security clearance.

Appeal Issues

1. Whether certain factual findings by the Administrative Judge are erroneous. Department Counsel quotes verbatim four long paragraphs from the Administrative Judge's decision and then asserts in a cursory manner that the record evidence does not support the Judge's findings of fact (Appeal Brief at pp. 12-14). Department Counsel's cursory assertion of factual error lacks specificity. There is no presumption of error below, and the appealing party has the burden of raising claims of error with specificity. Directive, Additional Procedural Guidance, Item 30. An appealing party must provide specificity in its claims of error so the nonappealing party can have a reasonable opportunity to respond to those claims of error⁽¹⁾ and the Board can discern what the appealing party is claiming to be factual or legal error by the Judge. The Board will not consider Department Counsel's cursory, general assertion of factual error by the Judge.⁽²⁾ Rather, the Board will consider only those claims of factual error that Department Counsel raises with specificity. *See, e.g.*, ISCR Case No. 99-0254 (February 16, 2000) at p. 2 ("The Board need not address appeal arguments that merely assert a Judge erred without identifying how the Judge supposedly erred.").

Department Counsel specifically contends the Administrative Judge erred by finding that: (a) Applicant's decision to get an undergraduate degree in a foreign country (FC) was motivated by economic considerations rather than a preference for FC; and (b) Applicant has used an FC passport out of necessity, not a preference for FC. The Board will address these contentions in turn.

(a) Applicant's explanation for why he got an undergraduate degree in FC provides support for the Administrative Judge's finding that Applicant was motivated by economic considerations to get an undergraduate education in FC. Department Counsel's appeal argument does not specifically challenge the Judge's finding that Applicant was motivated by economic considerations. Rather, Department Counsel's argument challenges the Judge's conclusion that those economic considerations did not demonstrate a foreign preference for FC. Department Counsel's argument does not challenge the Judge's finding so much as the conclusion she drew from that finding. The merits of Department Counsel's argument will be addressed later in this decision.

(b) The Administrative Judge found that Applicant used his FC passport (instead of his United States passport) in 1989 when entering a foreign country other than FC, and that Applicant did so to save money because he was traveling on limited budget. Department Counsel persuasively argues that Applicant's action was not based on necessity, but rather his personal convenience. Department Counsel is correct in contending that using a foreign passport for personal convenience is evidence of a foreign preference under Criterion C. *See, e.g.*, ISCR Case No. 98-0252 (September 15, 1999) at pp. 7-8.

Department Counsel also challenges the Administrative Judge's finding that Applicant's use of an FC passport to enter FC has been based on necessity. There is sufficient record evidence in this case to support the Judge's finding. The significance of this factual finding will be discussed later in this decision.

2. Whether the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law. Department Counsel contends the Administrative Judge's favorable decision is arbitrary, capricious, and contrary to law. In support of that contention, Department Counsel argues: (a) the Administrative Judge's erred by concluding Applicant's motivation in getting an undergraduate education in FC did not demonstrate a foreign preference for FC; (b) the Judge erred by concluding Applicant's use of an FC passport to enter another country in 1989 was mitigated because it occurred when he was traveling on a limited budget; (c) the Judge erred by concluding Applicant's use of an FC passport to enter FC was extenuated or mitigated because Applicant was legally required to do so; (d) the Judge failed to give due weight to the evidence that Applicant has not demonstrated an unconditional willingness to renounce his FC citizenship and surrender his FC passport; (e) the Judge erred by concluding Applicant's family ties in FC did not pose a security risk under Criterion B; and (f) the Judge failed to give proper consideration to the evidence that Applicant is likely to use an FC passport in the future to visit his family members in FC. For the reasons that follow, the Board concludes some of Department Counsel's arguments have merit.

Before addressing the merits of Department Counsel's appeal arguments, the Board will address one of Applicant's appeal arguments. Specifically, Applicant argues that he has been honest with the Department of Defense about his situation. The Board notes that there is no record evidence suggesting dishonesty or lack of candor by Applicant. Furthermore, the SOR issued in this case does not allege any dishonesty or lack of candor by Applicant as a basis for denying or revoking access to classified information. Even in the absence of any evidence of dishonesty or lack of candor by Applicant, the government is entitled to consider whether Applicant's foreign ties and use of an FC passport raise doubts as to his suitability for a security clearance.

(a) On its face, Applicant's conduct in getting an undergraduate education in FC gives rise to a question whether Applicant prefers FC over the United States. *See* Foreign Preference Disqualifying Condition 4 ("[A]ccepting educational, medical, or other benefits, such as retirement and social welfare, from a foreign country"). In general, the mere presence of an Adjudicative Guideline for or against clearance is not solely dispositive of a case. Rather, a Judge must consider applicable Adjudicative Guidelines in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 99-0500 (May 19, 2000) at p. 4; ISCR Case No. 99-0012 (December 1, 1999) at pp. 3-4. Accordingly, the applicability of Foreign Preference Disqualifying Condition 4 did not, by itself, compel the Judge to make an adverse security clearance.

However, the Administrative Judge's conclusion about the significance of Applicant's conduct in getting an undergraduate education in FC demonstrates an arbitrary, piecemeal approach to analyzing the facts and circumstances of Applicant's case. Department Counsel is correct in arguing that conduct motivated in part by an applicant's personal financial interests can also be indicative of a foreign preference. *See, e.g.*, ISCR Case No. 98-0476 (December 14, 1999) at p. 5. Furthermore, even if Applicant's conduct in getting an undergraduate education in FC, standing alone, were deemed insufficient to demonstrate a foreign preference under Criterion C, the Judge had the obligation to consider the security significance of Applicant's conduct in light of the record as a whole, including other evidence indicating a foreign preference by Applicant. *See, e.g.*, ISCR Case No. 99-0122 (April 7, 2000) at p. 3 ("By analyzing each incident, one at a time, the Judge failed to consider the significance of Applicant's pattern of conduct."); ISCR Case No. 99-0123 (January 11, 2000) at p. 3 (under whole person concept, Administrative Judge must consider applicant's overall history of conduct, not evaluate it in a piecemeal manner); ISCR Case No. 89-1377 (November 2, 1990) at p. 4 ("Even if . . . any one facet of Applicant's conduct might not, by itself, be sufficient to support an adverse security clearance decision, the Administrative Judge may still consider whether the totality of Applicant's conduct has negative security implications."). It was arbitrary and capricious for the Judge to evaluate Applicant's stated reason for getting an undergraduate education in FC apart from the totality of Applicant's conduct and circumstances, which include extensive ties to FC. Applicant's argument about the lack of security significance in his undergraduate education in FC is not persuasive.

(b) It was arbitrary and capricious for the Administrative Judge to conclude Applicant's use of an FC passport in 1989 to enter a country other than FC was mitigated because it occurred when he was traveling on a limited budget. As discussed in the preceding paragraph, conduct motivated in part by an applicant's personal financial interests can also be indicative of a foreign preference. And, an applicant's use of a foreign passport (instead of a United States passport) for personal convenience is indicative of a foreign preference under Criterion B. *See, e.g.*, ISCR Case No. 98-0252 (September 15, 1999) at pp. 7-8 (when using a foreign country passport for his personal convenience, applicant was exercising the rights and privileges of a citizen of that foreign country and was holding himself out to others as a citizen of that country, not as a United States citizen); ISCR Case No. 98-0355 (March 12, 1999) at p. 3 (use of a foreign passport as a matter of convenience is indicative of a foreign preference). In addition, Applicant's argument about the insignificance of his single use of an FC passport in 1989 to enter a country other than FC is effectively covered by the Board's discussion of the ASDC3I memo later in this decision. And, even if the Board were to assume solely for purposes of deciding this appeal that the ASDC3I memo were not dispositive on this point, the dated nature of Applicant's 1989 use of an FC passport does not diminish or negate the negative security implications of Applicant's present situation (including his ties with FC).

(c) The Board has held that an applicant's use of a foreign passport can be extenuated or mitigated when it is based on legal necessity. *See* ISCR Case No. 99-0452 (March 21, 2000) at pp. 8-9; ISCR Case No. 98-0476 (December 14, 1999) at pp. 2-3. If the Board were to apply that precedent, it would hold that the Administrative Judge did not act in an arbitrary or capricious manner by concluding Applicant's use of an FC passport when traveling to FC was extenuated or

mitigated because Applicant was required to do so. However, that precedent has been superseded and is no longer viable.

The ASDC3I memo indicates that it "applies to all cases in which a final decision has not been issued as of the date of this memorandum." Under Directive, Additional Procedural Guidance, Item 36, a security clearance decision that has been appealed is not final until the appeal has been withdrawn (Item 36.d.) or the Board affirms or reverses the Administrative Judge's decision (Item 36.e.). Accordingly, the ASDC3I memo applies to this case.

Under Section E.1 of the Directive, the ASDC3I has the authority to, *inter alia*, establish adjudicative standards, oversee the application of such standards, and to issue clarifying guidance and instructions. Guidance from the ASDC3I concerning adjudicative standards supersedes any interpretation of those standards by the Board.

The ASDC3I memo indicates that possession or use of a foreign passport is a disqualifying condition with "no mitigating factor related to the applicant's personal convenience, safety, requirements of foreign law, or the identity of the foreign country." Therefore, the ASDC3I memo effectively overrules those portions of the two Board decisions (cited above) which held that an applicant's use of a foreign passport may be extenuated or mitigated when the applicant acted out of legal necessity. Accordingly, application of the requirements of the ASDC3I memo to this case mandates reversal of the Administrative Judge's formal findings in favor of Applicant with respect to his possession and use of an FC passport.

(d) Department Counsel's arguments concerning the Administrative Judge's findings and conclusions about Applicant's willingness to renounce his FC citizenship have mixed merit. The Board will address those arguments in turn.

The passage from the Administrative Judge's decision cited by Department Counsel does not persuade the Board that the Judge made a loyalty determination in violation of Section 7 of Executive Order 10865.

Department Counsel argues there is conflicting record evidence on whether Applicant is willing to renounce his FC citizenship. Applicant argues the record evidence about his intentions to renounce his FC citizenship is not inconsistent or conflicting. The Board need not decide whether the record evidence about Applicant's intentions about renouncing his FC citizenship should be characterized as "conflicting" or "inconsistent." Considering the record as a whole, the Administrative Judge had a rational basis for finding Applicant has expressed a conditional willingness to renounce his FC citizenship.

Department Counsel correctly notes a conditional willingness to renounce foreign citizenship is entitled to less weight than an unconditional willingness to do so. *See, e.g.*, ISCR Case No. 99-0254 (February 16, 2000) at p. 3. Furthermore, Department Counsel persuasively argues the record evidence shows Applicant's conditional willingness to renounce his FC citizenship is based in part on strong personal reasons, including his ties with family members in FC. As will be discussed later in this decision, those family ties have security significance. Under the whole person concept, the security significance of Applicant's conditional willingness to renounce his FC citizenship cannot be considered independently of the security significance of the totality of Applicant's conduct and circumstances. Even if the Board were to accept Applicant's argument that the record evidence shows he has been reluctant to renounce his FC citizenship in part because he does not want to draw unnecessary attention to his case, such a motivation does not negate or overcome the security significance of the totality of Applicant's conduct and circumstances.

(e) Department Counsel argues the Administrative Judge erred by concluding Applicant's ties to family members in FC do not pose an unacceptable security risk. Department Counsel's argument is persuasive for several reasons.

Even if the Administrative Judge were justified in finding that Applicant could not be coerced because of his ties with family members in FC, the Judge erred by failing to consider whether Applicant could be influenced by noncoercive means because of those family ties. *See, e.g.*, ISCR Case No. 98-0265 (March 17, 1999) at p. 3 (noting vulnerability to undue influence is not limited to possible blackmail, but can include vulnerability to subtle or noncoercive influence).⁽³⁾ Even if the Judge were to conclude FC is a country not likely to try to threaten Applicant through his family members in FC, that would not end the analysis of the security significance of Applicant's family ties. The Judge failed to consider whether Applicant could be influenced in a noncoercive manner based on his family ties in FC. For example, Applicant

could be asked to disclose classified information to FC, not to harm the United States, but to increase the security of FC so his family members (and his wife's parents) in FC can live in peace and safety. Or Applicant could be asked to disclose classified information to FC, not to harm the United States, but to reduce threats to the lives of FC military personnel, including Applicant's sister (currently a member of the FC military) and his younger brother (who will be required to serve in the FC military once he graduates from high school).⁽⁴⁾

The Administrative Judge gave undue weight to her finding that Applicant's family members do not have connections with the FC government. The Judge's finding is erroneous to the extent that Applicant has a sister who is a member of the FC military, which is a component of the FC government. Furthermore, 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. *See* ISCR Case No. 98-0507 (May 17, 1999) at pp. 10-11 (discussing various facets of security significance of family ties in a foreign country). An applicant can have strong family ties to relatives in a foreign country even if none of the applicant's relatives has a job, position or official connection with the government of that foreign country. The security significance of an applicant's family ties does not turn simply on whether or not any of the applicant's relatives has a job, position, or official connection with the government of a foreign country.⁽⁵⁾

The Administrative Judge's analysis of Applicant's ties with family members (and in-laws) in FC also reflected a piecemeal analysis of Applicant's case. Applicant does not merely have ties with family members and in-laws in FC. Applicant grew up in FC (from age 2 to age 18); Applicant served in the FC military (active and reserve duty) for several years; Applicant received an undergraduate education in FC. Indeed, Applicant has spent approximately 26 years living in FC, mostly during his formative years and his early adulthood. Applicant's personal experiences in growing up in FC, serving in the FC military, and getting an undergraduate education in FC provide an important context in which his family ties in FC must be considered. In addition, the record shows Applicant's ties with his family in FC are close and continuing ones. The totality of these facts is relevant to assessing the security significance of Applicant's family ties, not just Applicant's family ties viewed in isolation. *Cf.* ISCR Case No. 98-0331 (May 26, 1999) at p. 8 (applicant's financial ties in a foreign country should not be considered in isolation, but rather must be considered in light of record as a whole).

(f) Department Counsel also argues that the Administrative Judge failed to give proper consideration to the evidence that Applicant is likely to use an FC passport in the future to visit his family members in FC. This argument need not be addressed separately because it is resolved in favor of Department Counsel for the reasons set forth in connection with appeal issue 2(c).

As discussed earlier in this decision, application of the ASDC3I memo to this case mandates reversal of the Administrative Judge's formal findings in favor of Applicant with respect to those SOR paragraphs concerning Applicant's possession and use of an FC passport. Even if the ASDC3I memo were not applicable to this case, the totality of the facts and circumstances of Applicant's case would raise serious questions as to his security eligibility. Applicant's case presents a complex set of facts and circumstances, some of which place Applicant in a sympathetic light and may appear to have little obvious negative security significance when viewed in isolation. However, under the whole person concept, an applicant's security eligibility cannot be evaluated in a piecemeal manner. The Administrative Judge's favorable conclusions about various aspects of Applicant's conduct and situation reflect a piecemeal analysis of the case that is not consistent with the whole person concept and, therefore, those favorable conclusions cannot be sustained on appeal.

Conclusion

Department Counsel has met its burden of demonstrating error that warrants reversal. Accordingly, the Board reverses the Administrative Judge's November 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. The nonappealing party has the right to submit a reply brief. Directive, Additional Procedural Guidance, Item 30.
2. The defect of Department Counsel's cursory assertion of factual error is highlighted by the fact that portions of the four paragraphs quoted by Department Counsel are obviously factually correct and can not reasonably be challenged by Department Counsel.
3. The Basis section of Criterion B (Foreign Influence) discusses noncoercive means of influence and does not limit itself to coercive means of influence.
4. Applicant argues that his sister's ties with the FC military will end within a year. The current security significance of Applicant's sister's FC military service is not diminished by the possibility that her military service will end in the future. And, in any event, Applicant's argument loses any persuasive value it might have because he has a brother who faces mandatory military service in FC upon graduation from high school.
5. Foreign Influence Disqualifying Condition 3 reads "relatives, cohabitants, or associates who are connected with any foreign government." Even if this disqualifying condition is not applicable in a given Criterion B case, the Administrative Judge still must consider, in light of the totality of the facts and circumstances of the case, whether the applicant's family ties in a foreign country have negative security significance.