DATE: February 8, 2001

In Re:

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

Applicant for Security Clearance

ISCR Case No. 99-0424

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Pamela B. Stuart, Esq.

Administrative Judge Richard A. Cefola issued a decision, dated January 7, 2000, 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 erred by soliciting from Applicant a post-hearing submission, admitting that submission into evidence, and giving it inordinate weight; (2) whether the Administrative Judge erred by finding that Applicant demonstrated mitigation sufficient to overcome the government's case against him; and (3) 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 issued to Applicant a Statement of Reasons (SOR) dated July 21, 1999. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence).

A hearing was held on December 17, 1999. The Administrative Judge issued a written decision, dated January 7, 2000, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed the Judge's favorable 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. Both parties made submissions.

Administrative Judge's Findings

Applicant was born in a foreign country (FC). Applicant became a naturalized U.S. citizen in 1984.

Applicant retained his FC passport after becoming a naturalized U.S. citizen because FC considered him to be an FC citizen. Applicant allowed his FC passport to expire in 1990. He applied for and was issued another FC passport in 1993.

Applicant has two children from his first marriage. In 1991, Applicant divorced his first wife due to irreconcilable differences. There was a continuing custody battle concerning the two children. In 1993, Applicant panicked and fled to FC, taking his two children with him. Applicant remained in FC with his children until 1996, when they returned to the United States after Applicant had resolved the differences with his former wife. Applicant described his flight to FC as "the stupidest thing that anyone could have ever done."

In 1996, Applicant applied for and received an FC passport. Applicant used the FC passport to travel to and from FC in March 1996, July 1996 and November 1996 (twice). In November 1996, Applicant traveled to FC to get his fiancee, went with her to another country to get a U.S. visa for her, and then returned to FC. Applicant and his fiancee then departed FC to go to the United States. Applicant traveled to FC again in November 1997 to visit his family there.

Applicant used his FC passport to enter and leave FC. He used his U.S. passport when entering or exiting the United States. FC does not have diplomatic relations with the United States. The U.S State Department recommends that dual nationals not use their U.S. passports when entering or exiting FC.

Applicant recently renounced his FC citizenship and returned his FC passport to the FC interests section in the United States. Applicant has no intention of returning to FC.

Applicant's current spouse is a citizen of FC and resides in the United States, as a resident alien, with Applicant.

Applicant's mother, brother, and two sisters are FC citizens who live in FC. Applicant's mother lives off the estate of her deceased husband. At the time of the hearing, Applicant's mother was visiting Applicant in the United States. Applicant's two sisters have applied for residency status in the United States. Applicant and his brother have had a "falling out" and have not spoken to each other since 1994 or 1995.

Applicant's second line supervisor gave laudatory testimony about Applicant.

Administrative Judge's Conclusions

Applicant was following the recommendation of the U.S. State Department when he used his FC passport to enter or exit FC. Applicant recently renounced his FC citizenship and returned his FC passport. Therefore, Applicant has clearly demonstrated he does not prefer FC over the United States.

There is no foreign influence over Applicant that his mother, two sisters and brother could have because Applicant's elderly mother lives comfortably in FC and can travel to the United States to visit Applicant, his two sisters are housewives and are waiting to emigrate to the United States, and Applicant and his estranged brother have not spoken in years.

Applicant has rebutted the government's case against him regarding his past foreign preference or influence, and has met the mitigating conditions of Guidelines B and C and Section F.3 of the Directive.[(1)] Accordingly, Applicant met his ultimate burden of persuasion, and it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Appeal Issues

1. Whether the ASDC3I memo is applicable to this case. Before addressing the appeal issues raised by Department Counsel, the Board needs to address the threshold issue of whether the ASDC3I memo is applicable to this case.

In response to the September 1, 2000 letter, Department Counsel argues: (a) the ASDC3I memo should be applied because no final decision has been issued in Applicant's case; (b) the ASDC3I memo is not dispositive because there is some record evidence which could support claim that Applicant surrendered his passport after the hearing; and (c) the Board should reverse Administrative Judge's favorable decision based on Department Counsel's other appeal arguments.

In response to the September 1, 2000 letter, Applicant argues: (a) the ASDC3I memo has little or no applicability to this case because: (i) the ASDC3I memo, by its terms, claims to clarify and restate current DoD adjudication policy; therefore, prior decisions by Hearing Office Administrative Judges and the Board are still fully applicable to the decision in this case; (ii) Executive Order 12968 precludes discrimination based on national origin in security clearance decisions; and (iii) federal legislation prohibits discrimination based on national origin; (b) the ASDC3I memo fails to define what constitutes "official approval" for use of a foreign passport, and it requires affirmative action by an applicant to renounce foreign citizenship, and therefore, the ASDC3I memo is in conflict with U.S. State Department policy on dual nationality and use of foreign passports by dual citizens; (c) the ASDC3I memo applies "rigid criteria" that do not take into account individual situations or different foreign laws, requires unlawful discrimination based on national origin, "would be impossible to apply equitably," and "is bad public policy"; (d) the ASDC3I memo is *ex post facto* law, would violate the Due Process Clause, and would violate Applicant's due process rights under Executive Order 10865; and (e) even if ASDC3I memo were to be applied, Applicant has complied with its requirements.[(2)]

In response to Applicant's position on the ASDC3I memo, Department Counsel argues: (a) Department Counsel is not relying on ASDC3I memo in urging the Board to reverse Administrative Judge's decision; (b) most of Applicant's arguments about the legality of ASDC3I memo are rendered moot by his post-hearing surrender of his FC passport; (c) mere surrender of a foreign passport does not mean that an applicant must be given a security clearance; and the record as a whole in this case warrants denial of access to classified information for Applicant; and (d) Applicant's earlier promised renunciations of FC citizenship undercut any weight that should be given to his post-hearing actions.

The ASDC3I memo addresses security clearance adjudications in cases involving the possession and use of a foreign passport. Applicant's case involves, *inter alia*, the possession and use of an FC passport. 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 E3.1.36, a security clearance decision that has been appealed is not final until the appeal has been withdrawn (Item E3.1.36.4) or the Board affirms or reverses the Administrative Judge's decision (Item E3.1.36.5). Accordingly, the ASDC3I memo applies to this case. *See* ISCR Case No. 99-0481 (November 29, 2000) at p. 5 n.1; ISCR Case No. 99-0295 (October 20, 2000) at p. 6; ISCR Case No. 99-0454 (October 17, 2000) at p. 5.[(3)]

Department Counsel asserts that the ASDC3I memo is not dispositive because there is some record evidence which could support claim that Applicant surrendered his passport after the hearing. The ASDC3I memo indicates that "consistent application of the guideline requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government." Applicant's post-hearing submission indicates Applicant surrendered his FC passport to the FC interests

section of a third party embassy in the United States. Department Counsel's appeal argument on this point makes sense only if Department Counsel is conceding, at least for purposes of this appeal, that Applicant's post-hearing submission is sufficient to satisfy Applicant's burden of proof that he has complied with that portion of the ASDC3I memo that states "any clearance [must] be denied or revoked unless the applicant surrenders the foreign passport." Accordingly, the Board concludes that Department Counsel is not relying on the ASDC3I memo to support its contention that the Administrative Judge's favorable security clearance decision should be reversed.[(4)]

The Board does not find merit in Applicant's argument that prior decisions by Hearing Office Administrative Judges[(5)] and the Board are still fully applicable to the decision in this case because the ASDC3I memo, by its terms, indicates it is clarifying and restating current DoD adjudication policy. Under Section 5.1 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. Nothing in the Directive indicates or suggests that the ASDC3I's authority is controlled, constrained, or otherwise limited by decisions made by Hearing Office Administrative Judges or the Board. Accordingly, guidance from the ASDC3I concerning adjudicative standards supersedes any interpretation of those standards by the Hearing Office Administrative Judges or the Board. Furthermore, nothing in the ASDC3I memo indicates that the ASDC3I was adopting, incorporating by reference, or endorsing any DOHA decision concerning an applicant's possession and use of a foreign passport. To the contrary, the ASDC3I memo contains language that has the practical effect of superseding the Board's prior rulings concerning legal necessity in foreign passport cases. In view of all the foregoing, the ASDC3I memo effectively supersedes any prior Board decision or Hearing Office Administrative Judge decision to the extent the decision is inconsistent with the guidance provided by the ASDC3I memo. *See also* ISCR Case No. 99-0601 (January 30, 2001) at p.10; ISCR Case No. 99-0457 (January 3, 2001) at p. 5. Therefore, Applicant's reliance on such prior decisions in this appeal is not well-founded.

Applicant correctly notes that Executive Order 12968, Section 3.1 (c) indicates that "The United States Government does not discriminate on the basis of race, color, religion, sex, national origin, disability, or sexual orientation in granting access to classified information." However, the SOR allegations in this case and the evidence presented by Department Counsel in support of those allegations are not based simply on Applicant's national origin. Nothing in Executive Order 12968, Section 3.1. indicates or suggests that an applicant's national origin precludes consideration of an applicant's conduct or circumstances that raise security concerns. Applicant's argument that federal legislation prohibits discrimination based on national origin is addressed to the wrong forum. Neither Hearing Office Administrative Judges nor the Board has the jurisdiction or authority to adjudicate claims under federal civil rights statutes.

The Board does not find relevance in Applicant's argument that ASDC3I memo is in conflict with U.S. State Department policy on dual nationality and use of foreign passports by dual citizens. Nothing in Executive Order 12968, Executive Order 10865, or the Directive requires that DoD policies, practices, or procedures in security clearance adjudications must be consistent with State Department policies, practices or procedures, especially ones that on their face do not deal with security clearance adjudications.[(6)]

The Board cannot entertain Applicant's attacks on the wisdom or desirability of the ASDC3I memo. The Board's jurisdiction and authority are limited to reviewing security clearance decisions by Hearing Office Administrative Judges. *See* Directive, Additional Procedural Guidance, Item E3.1.28 - E3.1.35. Nothing in the Directive gives the Board the jurisdiction or authority to pass on the wisdom or desirability of guidance provided by the ASDC3I. *See* ISCR Case No. 99-0457 (January 3, 2001) at p. 5; ISCR Case No. 99-0480 (November 28, 2000) at p. 8.

Applicant also contends that application of the ASDC3I memo to his case would violate the *Ex Post Facto* Clause and the Due Process Clause of the U.S. Constitution. We conclude Applicant's challenges to the ASDC3I memo based on the *Ex Post Facto* Clause and the Due Process Clause of the U.S. Constitution fail for the reasons that follow.

Ex Post Facto Clause. The U.S. Constitution has two *Ex Post Facto* Clauses: Article I, Section 9, Clause 3 and Article I, Section 10, Clause 1. On its face, Article I, Section 10, Clause 1 applies to the states, not the federal government. And, Applicant cites only Article I, Section 9, Clause 3 in support of his contention. Accordingly, the Board need consider only Article I, Section 9, Clause 3 (hereinafter "*Ex Post Facto* Clause").

The *Ex Post Facto* Clause is applicable only to criminal or penal legislation. *Landsgraf v. USI Film Products*, 511 U.S. 244, 266 n.19 (1994). The *Ex Post Facto* Clause does not apply to civil or regulatory law. *United States v. O'Neal*, 180 F.3d 115, 122 (4th Cir. 1999), *cert. denied*, 120 S.Ct. 433 (1999). Nor does the *Ex Post Facto* Clause apply to legislation imposing civil disabilities. *Karpi v. Commissioner of Internal Revenue*, 909 F.2d 784, 787 (4th Cir. 1990). Moreover, the *Ex Post Facto* Clause applies only to the legislative branch, not the other branches of the federal government. *Prater v. U.S. Parole Commission*, 802 F.2d 948, 951-52 (7th Cir. 1986). Accordingly, the *Ex Post Facto* Clause does not apply to Executive Branch civil decisions. For example, the *Ex Post Facto* Clause does not apply to deportation proceedings, which are purely civil actions to determine eligibility to remain in the United States, not to punish. *Scheidemann v. Immigration and Naturalization Service*, 83 F.3d 1517, 1520 n.4 (3d Cir. 1996); *Hamama v. Immigration and Naturalization Service*, 78 F.3d 233, 237 (6th Cir. 1996). The *Ex Post Facto Clause* does not apply to an OPM regulation that renders certain people ineligible for certain federal jobs because it is civil, not criminal, in nature. *Dehainaut v. Pena*, 32 F.3d 1066, 1073 (7th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995). *See also Korte v. Office of Personnel anagement*, 797 F.2d 967, 972 (Fed. Cir. 1986). And, the mere denial of a noncontractual government benefit without a showing of penal intent does not violate the *Ex Post Facto* Clause. *Peeler v. Heckler*, 781 F.2d 649, 651 (8th Cir. 1986).

Security clearance adjudications are civil, not criminal, proceedings by Executive Branch officials and employees. Furthermore, security clearance decisions involve the grant or denial of a noncontractual government privilege. *See Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("It should be obvious that no one has a 'right' to a security clearance. The grant of a clearance requires an affirmative act of discretion on the part of the granting official."). Accordingly, the *Ex Post Facto* Clause has no application in these proceedings. Applicant's reliance on the *Ex Post Facto* Clause to challenge application of the ASDC3I memo lacks merit.

Due Process Clause. The Due Process Clause has potential relevance to protecting a person's civil interests in receiving fair notice and repose that might be compromised by legislation that has retroactive effect. *Landsgraf v. USI Film Products*, 511 U.S. 244, 266 (1994). The presumption against retroactivity of civil law is generally raised in connection with new law "affecting contractual or property rights, matters in which predictability and stability are of prime importance." *Landsgraf v. USI Film Products*, 511 U.S. 244, 271 (1994). *See also DeOsorio v. U.S. Immigration and Naturalization Service*, 10 F.3d 1034, 1042 (4th Cir. 1993)("In general, the concern regarding retroactive application of statutes is the deprivation of rights without notice and fair warning . . . ."). The presumption against retroactivity of civil law does preclude withdrawal of a previously available form of discretionary relief based on attaching present consequences to past conduct. *DeOsorio v. U.S. Immigration and Naturalization Service*, 10 F.3d 1034, 1042 (4th Cir. 1993). As noted in the preceding paragraph, there is no right to a security clearance. Furthermore, no applicant has a vested right or reasonable expectation in continued retention of a security clearance that was previously granted. *See* ISCR Case No. 99-0511 (December 19, 2000) at p. 8; ISCR Case No. 99-0481 (November 29, 2000) at p. 5; ISCR Case No. 96-0277 (July 11, 1997) at p. 5. *Cf.* ISCR Case No. 99-0454 (October 17, 2000) at pp. 3-4 (reciprocity provision of NISPOM does not bar or preclude a federal agency from reconsidering or reopening its own security clearance decisions). Accordingly, even if the Board were to accept, solely for purposes of deciding this appeal, Applicant's assertion that application of the ASDC3I memo to his case would be retroactive in nature, such a retroactive application would not run afoul of the Due Process Clause.

Applicant fails to articulate how application of the ASDC3I memo would violate his right to due process under Executive Order 10865.

As indicated earlier in this decision, Department Counsel is not relying on the ASDC3I memo to argue that the Board should reverse the Administrative Judge's favorable decision. Furthermore, the Board does not rely on the ASDC3I memo to reach its decision that the Judge's favorable security clearance decision should be reversed. Accordingly, Applicant's argument about complying with the ASDC3I memo after the hearing does not provide a sufficient reason for the Board to affirm the Judge's decision.

2. Whether the Administrative Judge erred by soliciting from Applicant a post-hearing submission, admitting that submission into evidence, and giving it inordinate weight. At the hearing, the Administrative Judge solicited from Applicant a post-hearing submission. Department Counsel raised no objection to the Judge's solicitation of a post-hearing submission from Applicant. In response to the Judge's solicitation, Applicant submitted a letter dated December

22, 1999 (with a cover letter of December 23, 1999). Department Counsel objected to admission of the post-hearing submission on the grounds that it was hearsay. The Judge admitted the post-hearing submission (Applicant Exhibit M) over Department Counsel's hearsay objection.

On appeal, Department Counsel contends the Administrative Judge erred by soliciting from Applicant a post-hearing submission concerning renunciation of his FC citizenship and surrender of his FC passport. In support of this contention, Department Counsel argues: (a) the Judge's action denied Department Counsel of its right to cross-examine the Applicant and its right to offer rebuttal evidence; and (b) Judge should not have considered evidence of action that Applicant could have undertaken before the hearing, but did not do so until after the hearing. Department Counsel argues, in the alternative, that the Judge gave undue weight to the post-hearing evidence in light of strong record evidence of Applicant's exercise of dual citizenship in past.

Applicant contends the Administrative Judge had discretion to admit and rely on the post-hearing submission. Applicant argues, in the alternative, that even if the post-hearing submission had never been admitted, Applicant has nevertheless rebutted the allegations of foreign preference.

The totality of Department Counsel's actions, at the hearing level and on appeal, leads the Board to conclude Department Counsel has waived its objections to the admission of Applicant's post-hearing submission. At the hearing, Department Counsel raised no objection when the Judge solicited a post-hearing submission from Applicant. If Department Counsel had any concerns about how such a post-hearing submission would affect its right to cross-examine Applicant or its right to offer rebuttal evidence, then Department Counsel could have raised those concerns when it became clear that the Judge was soliciting a post-hearing submission from Applicant. Moreover, Department Counsel did not raise any such concerns when Applicant's post-hearing submission was received. Rather, Department Counsel merely raised a perfunctory hearsay objection. Because there is no *per se* bar to hearsay evidence in DOHA proceedings,[(7)] Department Counsel's perfunctory hearsay objection lacked specificity and did not place the Judge on reasonable notice of the nature of Department Counsel's objection.

Furthermore, in response to the September 1, 2000 letter concerning the ASDC3I memo, Department Counsel took the position that the ASDC3I memo is not dispositive because there is some record evidence which could support Applicant's claim that he surrendered his FC passport after the hearing. Also, as noted earlier in this decision, Department Counsel took the position that Applicant's arguments about the legality of ASDC3I memo are rendered moot by his post-hearing surrender of his FC passport. Department Counsel could take those positions only if Department Counsel accepts that Applicant's post-hearing submission was properly admitted into evidence by the Administrative Judge. Given Department Counsel's reliance on Applicant's post-hearing submission to support its positions concerning the ASDC3I memo, the Board concludes that Department Counsel has, for all practical purposes, withdrawn its challenge to Applicant's post-hearing submission. In the alternative, Department Counsel's reliance on Applicant's post-hearing submission in stating its position concerning the ASDC3I memo constitutes a waiver on appeal of its challenge to the post-hearing submission.

3. Whether the Administrative Judge erred by finding that Applicant demonstrated mitigation sufficient to overcome the government's case against him. Department Counsel challenges the Administrative Judge's conclusion that Applicant rebutted the government's case against him under Guidelines B and C. In support of this challenge, Department Counsel argues: (a) the Judge did not make a clear ruling on whether Department Counsel had established a *prima facie* case against Applicant under Guideline B and Guideline C, and the Judge appears to have concluded that Department Counsel had established a *prima facie* case against Applicant, but that he had met his burden of persuasion concerning mitigation; (b) the Judge erred by not giving due consideration to the security significance of the circumstances of Applicant's acts in obtaining and using an FC passport; (c) the Judge erred in considering Applicant's recent renunciation of FC citizenship as mitigation notwithstanding other record evidence; (d) the Judge erred by concluding Applicant's family ties with relatives in FC do not demonstrate foreign influence under Guideline B; and (e) the record evidence does not support the Judge's conclusion that Applicant met his burden of demonstrating mitigation.

In reply, Applicant argues: (a) the reason the Judge might not have definitively found that Department Counsel established a *prima facie* case may be fact that Applicant largely admitted the SOR allegations; (b) Applicant showed extenuating circumstances surrounding his travel to FC; (c) Applicant's travel to FC occurred before he was aware of the

security significance that might be attached to what he regarded as a family matter; (d) there is no evidence that Applicant has any duties or obligations to FC; (e) Applicant renounced his FC citizenship when he became a naturalized U.S. citizen and reiterated that renunciation when he returned his FC passport, and the United States cannot force FC to recognize or accept Applicant's renunciation of FC citizenship; (f) Applicant acted out of personal reasons, not a sinister motive nor an affirmative foreign preference; (g) the testimony of colleagues shows Applicant's integrity and loyalty; and (h) the record evidence on Applicant's immediate family satisfies government's burden of going forward under Guideline B, but: there is record evidence that Applicant's wife left FC and she and other family members want to become U.S. citizens; Foreign Influence Mitigating Conditions 1, 3, and 5 apply; and there is no record evidence that Applicant's family is a security risk.

Department Counsel places too much significance on whether the Administrative Judge should have made a clear ruling on whether Department Counsel had established a *prima facie* case against Applicant. As Applicant correctly points out, Applicant's answer to the SOR essentially admitted the SOR allegations with explanations. To the extent that Applicant's answer admitted the SOR allegations, there were no controverted allegations which Department Counsel had the burden of proving. *See* Directive, Additional Procedural Guidance, Item E3.1.14. Furthermore, if a review of the record evidence shows that an applicant has admitted SOR allegations or Department Counsel has proven controverted SOR allegations, and if the Judge in fact then holds the applicant to his or her burden of proof under Directive, Additional Procedural Guidance, Item E3.1.5., then it does not matter whether a Judge expressly rules that Department Counsel has established a *prima facie* case against the applicant. Department Counsel's argument on this point seeks to elevate form over substance. Although the Judge committed other errors, a review of the decision below persuades the Board that the Judge did not err as Department Counsel contends he did on this aspect of the case.

Department Counsel persuasively argues that the Administrative Judge failed to give due consideration to the security significance of the circumstances of Applicant's acts in obtaining and using an FC passport. The Judge's decision fails to address the significance of the following record evidence: Applicant was in the middle of a child custody battle with his ex-wife and believed a court was going to award custody of the children to his ex-wife; Applicant listened to the advice of friends and explored the possibility of taking his children with him to FC and took a series of steps to facilitate his ability to take his children with him to FC; after completing those steps, Applicant fled the United States in 1993 and traveled to FC, taking his two children with him; at the time Applicant fled the United States, he did not plan to return to the United States; Applicant remained in FC with his two children until 1996; and Applicant did not return to the United States with his children until he had reached an understanding with his ex-wife. The totality of the record evidence about this aspect of the case shows that Applicant deliberately chose to exercise the rights and privileges of an FC citizen to flee the jurisdiction of a court in the United States to avoid an adverse judgment in his child custody battle.[(8)] The Judge's failure to discuss the significance of that record evidence was arbitrary and capricious[(9)] and contrary to his obligation to render a common sense decision that fairly took into account the record evidence as a whole. Directive, Section 6.3; Item E2.2.1; Additional Procedural Guidance, Item E3.1.25.

Department Counsel argues that the Administrative Judge erred in considering Applicant's recent renunciation of FC citizenship as mitigation notwithstanding other record evidence that detracts from the significance of Applicant's recent renunciation. Department Counsel's argument rests on the sound principle that a Judge cannot merely consider record evidence that supports the Judge's findings or conclusions, but rather that a Judge must consider the record evidence as a whole, including evidence that fairly detracts from the Judge's findings and conclusions. *See, e.g.*, ISCR Case No. 99-0205 (October 19, 2000) at p. 2 (noting it is not simply a matter of whether there is some evidence that supports a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings). A Judge has the obligation to issue a written decision that allows the parties and the Board to discern what the Judge is finding and concluding and how the Judge is analyzing the case. *See, e.g.*, ISCR Case No. 99-0018 (December 6, 1999) at p. 2 ("An Administrative Judge's decision must set forth findings and conclusions with sufficient specificity and clarity that the parties and the Board can discern what the Judge is finding and concluding."). *See also* ISCR Case No. 98-0809 (August 19, 1999) at p. 2 (discussing requirements for Administrative Judge's decision). When the record contains evidence that, on its face, clearly detracts from the Judge's findings and conclusions, then the Judge's decision must contain sufficient discussion, analysis or explanation to enable the parties and the Board to discern a rational basis for the findings the Judge made and the conclusions the Judge reached. *See, e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at p. 13 (Administrative Judge not at liberty to draw whatever inferences or conclusions the Judge wants; rather, a Judge must draw reasonable inferences and reasonable conclusions that the evidence fairly supports). The

Judge's decision in this case sets forth a wholly inadequate discussion, analysis or explanation for why Applicant's recent renunciation of FC citizenship is entitled to be given much weight in light of other record evidence that, viewed in its entirety, undercuts the significance of Applicant's recent action.

The Administrative Judge concluded he could find no foreign influence that Applicant's mother, two sisters, and brother (who all live in FC) might have over Applicant. Department Counsel contends the Administrative Judge erred because the record evidence: (a) is not sufficient to support the Judge's conclusion, (b) does not support application of any mitigating factors under the Adjudicative Guidelines or Section 6.3,[(10)] and (c) does not support the Judge's conclusion that Applicant rebutted the government's case against him. The Judge erred by failing to articulate a rational basis for his finding. The record evidence in this case raised sufficient security concerns under Guideline B to shift the burden of proof to Applicant to present evidence to rebut, extenuate or mitigate the government's case against him. *See* Directive, Additional Procedural Guidance, Item E3.1.15. The Judge's decision fails to articulate a rational connection between his factual findings and his conclusion that there is no basis for finding Applicant may be vulnerable to foreign influence. Furthermore, by considering only how Applicant's relatives in FC might exercise influence on him, the Judge failed to give any consideration to whether *other* persons or entities might be able to seek to exercise pressure, influence or coercion over Applicant through his immediate family members in FC. The Judge's failure to do so reflects an arbitrary and capricious approach to this case.

Applicant correctly notes that mere possession of family ties with persons in a foreign country is not, as a matter of law, automatically disqualifying under Guideline B. However, the possession of such ties does raise a *prima facie* security concern[(11)] sufficient to require an applicant to present evidence of rebuttal, extenuation or mitigation sufficient to meet the applicant's burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for the applicant. *See* Directive, Additional Procedural Guidance, Item E3.1.15. There is no presumption in favor of granting a security clearance, Directive, Item E2.2.2; *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991), and a Judge must articulate a rational explanation, based on a common sense evaluation of the record as a whole and pertinent provisions of the Directive, for why the Judge is making the affirmative finding that it is clearly consistent with the national interest to grant or continue a security clearance for the applicant. *See* Executive Order 10865, Section 2 (security clearance may be granted "only upon a finding that it is clearly consistent with the national interest to do so"). As discussed in the preceding paragraph, the Judge's failed to articulate a rational basis for his finding that Applicant's family ties in FC did not pose a security concern under Guideline B. Without such an articulated explanation, the Judge did not have a sustainable explanation for why he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Department Counsel also contends the record evidence does not support the Administrative Judge's conclusion that Applicant met his burden of demonstrating mitigation. In support of this contention, Department Counsel relies on the various arguments already discussed by the Board. As discussed earlier in this decision several of those arguments have merit. Those meritorious arguments, viewed in their entirety, also support this contention by Department Counsel.

Applicant's contention that there is no record evidence that he has any duties or obligations to FC does not have the significance Applicant ascribes to it. "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." ISCR Case No. 99-0254 (February 16, 2000) at p. 3. The absence of evidence that Applicant has duties or obligations to FC does not negate or reduce the security significance of Applicant's conduct and circumstances in this case.

Applicant places too much weight on his renunciation of FC citizenship when he became a naturalized U.S. citizen in 1984. Applicant correctly notes that the Board has noted the evidentiary significance of the oath of allegiance that individuals take when they become naturalized U.S. citizens. However, the Board has never held or suggested that the oath of allegiance is conclusive or dispositive evidence in a foreign preference case. Indeed, the Board has noted that the government is entitled to consider the security significance of an applicant's conduct and circumstances after the applicant took the oath of allegiance and became a naturalized citizen. *See, e.g.*, ISCR Case No. 99-0457 (January 3, 2001) at p. 4. *Cf.* ISCR Case No. 99-0480 (November 28, 2000) at p. 6. In this case, after Applicant became a naturalized U.S. citizen in 1984, he engaged in conduct indicative of a foreign preference within the meaning of Guideline B. The government is not precluded from considering that post-naturalization conduct in evaluating

Applicant's suitability for access to classified information.

Applicant also places too much weight on his contention that he acted out of personal reasons, not any sinister motive nor an affirmative foreign preference. The record evidence of Applicant's denial that he has acted because of a preference for FC is relevant, but it is not dispositive. Even if an applicant denies that he or she has acted because of a preference for a foreign country, the government is not precluded from considering whether the facts and circumstances of an applicant's case are indicative of a foreign preference. *Cf.* ISCR Case No. 00-0044 (December 22, 2000) at p. 3 (applicant's statements about his or her intent or state of mind are not binding or conclusive and must be considered in light of record evidence as a whole); ISCR Case 99-0205 (October 19, 2000) at p. 5 (same). To the extent that Applicant contends he was acting out of personal reasons, that contention does not help him. The negative security significance of acts indicative of a foreign preference is not negated or diminished merely because an applicant engages in those acts for personal reasons or for personal convenience. *See, e.g.*, ISCR Case No. 99-0295 (October 20, 2000) at p. 4; ISCR Case No. 98-0252 (September 15, 1999) at p. 8.

The favorable character evidence cited by Applicant does not, as a matter of law, compel a favorable security clearance decision. Character evidence, however strong and credible it may be, does not preclude the government from making an adverse security clearance decision based on facts and circumstances indicative of a foreign preference or foreign influence.

Applicant's reliance on Foreign Influence Mitigating Conditions 1, 3, and 5 is not persuasive. Foreign Influence Mitigating Condition 1[(12)] and 3[(13)] are relevant to an evaluation of Applicant's family ties in FC. The Board has addressed that aspect of this case earlier in this decision and need not repeat its discussion here. Foreign Influence Mitigating Condition 5[(14)]

does not help Applicant. The SOR did not allege that Applicant had or has foreign financial interests in FC. Department Counsel did not seek to prove that Applicant had or has foreign financial interests in FC. On its face, Foreign Influence Mitigating Condition 5 would be irrelevant to any foreign influence case where there is no evidence that the applicant had or has any financial interests in a foreign country. *Cf.* ISCR Case No. 97-0595 (May 22, 1998) at p. 5 (where Administrative Judge did not make threshold finding that there were facts or circumstances which increased applicant's vulnerability to coercion, exploitation or pressure, then it would not make sense for Judge to apply the Personal Conduct mitigating condition which dealt with reducing or eliminating such a vulnerability).

4. Whether the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law. Department Counsel contends the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law because the record evidence as a whole does not support the Judge's conclusion that Applicant mitigated case against him under Guidelines B and C. In support of this contention, Department Counsel argues: (a) Applicant possessed and used an FC passport to evade the laws of United States; (b) Applicant used an FC passport and availed himself of the protection of FC law after he became a naturalized a U.S. citizen;

(c) Applicant continued to possess and use his FC passport after returning to United States, using it to enter and exit FC five more times; (d) it is premature to conclude Applicant is entitled to be given access to classified information due to his recent renunciation of FC citizenship and return of his FC passport; (e) there is no determination that Applicant's immediate family members are not in a position to be exploited by FC; and (f) the totality of the record evidence raises substantial doubts about Applicant's suitability for access to classified information, and those doubts should be resolved in favor of the national security.

Applicant makes several arguments in reply to Department Counsel's contention: (a) to the extent that Department Counsel thought there were other issues raised by the evidence, it could have moved to amend the SOR, but did not do so; those concerns beyond the SOR allegations should not be considered in this proceeding; (b) the SOR did not "charge" that Applicant possessed and used a foreign passport to evade the laws of the United States; it was a mistake by Applicant arising out of a family spat, not an indication of a foreign preference; the evidence shows this is not likely to recur; and Department Counsel cannot properly rely on an inference that Applicant committed any crime in connection with this incident; (c) Applicant's travel to FC was not to avail himself of the protection of FC law; rather, he went to FC with his children to have help from his mother in raising his children until he and his ex-wife had reconciled;

(d) Applicant's possession and use of an FC passport was in conformity with State Department guidance, and therefore, there is no indication of a foreign preference; (e) Applicant's renunciation of FC citizenship is not merely recent, but occurred when he became a naturalized U.S. citizen in 1984; (f) Applicant's use of an FC passport was not a matter of foreign preference, but one of convenience; (g) it would not be "premature" to grant Applicant a security clearance; (h) the Judge properly found there is no evidence of foreign influence through Applicant's family; there is no record evidence of FC bribery or coercion and to conclude so would require speculation and conjecture; and (i) the ability of Department Counsel to argue for an alternate interpretation of record evidence is not enough to demonstrate error by the Judge.

Department Counsel contends Applicant possessed and used his FC passport to evade the laws of the United States. Department Counsel appears to be referring to Applicant's use of his FC passport to flee the United States in 1993 and take his two children with him to FC because he was concerned he was going to lose the child custody battle with his ex-wife. Contrary to Applicant's arguments, Department Counsel's contention does not improperly go beyond the SOR allegations in this case and it does not raise any inference that Applicant committed a crime. Applicant's use of an FC passport to take his children to FC was covered by SOR paragraph 1.a. Furthermore, the facts and circumstances of that incident were addressed at the hearing, are covered by ample record evidence, and are properly at issue in this case under the provisions of Section 6.3 and Item E2.2.1. of the Directive. Department Counsel's argument about this aspect of the case is based on record evidence and is consistent with zealous advocacy within the bounds of the law. There is no merit to Applicant's contention that Department Counsel's argument is improper. Given the record evidence in this case, it is untenable for Applicant to argue that he did not intend to take his two children to FC to thwart his ex-wife's effort to secure the custody of their two children through legal process in the United States. Even if Applicant's conduct was not criminal in nature, it clearly was aimed at removing Applicant and his two children from the lawful jurisdiction of a court in the United States and thwart his ex-wife's ability to seek legal relief from a court of competent jurisdiction.

The facts and circumstances of Applicant's possession and use of an FC passport in connection with his 1993 flight from the United States to FC with his two children and his action in remaining in FC until 1996 demonstrate Applicant was not acting out of legal necessity, but out of a deliberate and conscious decision to exercise the rights and privileges of an FC citizen to evade his responsibility as a U.S. citizen to abide by the due process of law in an American court. During that period, Applicant's actions clearly demonstrated his preference for FC over the United States when it suited him. The Board is not persuaded by Applicant's argument that taking his children to FC did not demonstrate a foreign preference because he would have gone to whatever foreign country his mother happened to reside in at the time. For purposes of Guideline C, a foreign preference is not limited to situations where an applicant demonstrates a preference for a single foreign country over the United States. A foreign preference can be shown if an applicant engages in conduct that shows the applicant has an *ad hoc*, situational preference for foreign countries over the United States whenever it suits the applicant. *Cf.* ISCR Case No. 98-0419 (April 30, 1999) at p. 8.

Applicant's reliance on a State Department Consular Information Sheet about FC is misplaced. Since Applicant was offering the State Department document as a kind of affirmative defense to extenuate or mitigate his conduct, Applicant had the burden of demonstrating two things: first, the document (or its equivalent) was in existence when he acted to obtain and use an FC passport; and second, Applicant acted in reliance on the State Department document (or its equivalent) when he obtained and used an FC passport. Applicant offered no evidence to support either point. The State Department document, dated September 14, 1999, cannot factually or logically be deemed relevant to Applicant's decision to obtain an FC passport and use it prior to the date of that document. Furthermore, nothing in the State Department document indicates or suggests that the State Department would authorize or condone a dual national using an FC passport to facilitate flight from the United States to avoid the lawful rulings of a court in the United States.

In response to the September 1, 2000 letter, Applicant makes contentions about what constitutes "official government approval" under the ASDC3I memo. The Board need not address or resolve this aspect of Applicant's arguments for two reasons. First, Applicant's arguments are based, in part, on information outside the record evidence. As indicated earlier in this decision, the Board cannot consider new evidence. Second, since Applicant failed to demonstrate the predicate basis for invoking the State Department document as an affirmative defense, the Board need not reach the question of whether the State Department document constitutes "official government approval" under the ASDC3I memo.

The Board does not find persuasive Applicant's argument that his use of an FC passport was not a matter of foreign

preference, but rather a matter of convenience. First, Applicant's claim of convenience is inconsistent with his claim of acting due to legal necessity. Second, as discussed earlier in this decision, the facts and circumstances of Applicant's flight from the United States to FC in 1993 demonstrate Applicant had a preference for FC over the United States when it suited him. Third, use of a foreign passport for personal convenience is not extenuating or mitigating under Guideline C. *See, e.g.*, ISCR Case No. 99-0295 (October 20, 2000) at p. 6.

Earlier in this decision, the Board discussed the matter of Applicant's family ties in FC. The Board need not repeat that discussion here.

Conclusion

Department Counsel has met its burden of demonstrating error that warrants reversal. Pursuant to Item E3.1.33.3 of the Directive, Additional Procedural Guidance, the Board reverses the Administrative Judge's January 7, 2000 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 provisions of the Directive were renumbered when change 4 was issued. The provision formerly numbered Section F.3. was renumbered Section 6.3.

2. Applicant relies, in part, on information that goes beyond the record below. That information constitutes new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

3. Applicant's arguments rely, in part, on differences between industrial security clearance adjudications by DOHA and security clearance adjudications by Central Adjudication Facilities and Personnel Security Appeal Boards in cases involving DoD civilian employees and military personnel. Those differences have no bearing on the question of whether DOHA is bound by the ASDC3I memo.

4. Department Counsel's other arguments concerning the significance of Applicant's post-hearing surrender of his FC passport will be addressed later in this decision.

5. Administrative Judge decisions are not binding on the Board, but they may be cited as persuasive authority. *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 5.

6. Applicant Exhibit I is a letter from a State Department official to Applicant's lawyer. That letter shows that State

Department guidance to dual nationals concerning the use of FC passports is aimed at informing them that they are not endangering their U.S. citizenship by using an FC passport to enter and exit FC. Neither that letter, nor the State Department Consular Information Sheet attached to it, indicates or suggests the State Department is addressing in any way the effect that use of an FC passport might have on a person's eligibility for a security clearance.

7. *See, e.g.*, ISCR Case No. 98-0592 (May 4, 1999) at p. 4; ISCR Case No. 98-0265 (March 17, 1999) at p. 7; DISCR Case No. 91-0859 (January 6, 1993) at p. 5 n.3; DISCR Case No. 89-1014 (August 6, 1992) at p. 4.

8. Applicant's appeal argument that Applicant's flight to FC was extenuated or mitigated because it was the unfortunate result of panic is untenable in light of the record evidence in this case.

9. *See, e.g.*, ISCR Case No. 99-0480 (November 28, 2000) at p. 5 (noting that failure to consider an important aspect of a case can be illustrative of an arbitrary and capricious decision).

10. *See* footnote 1 of this decision.

11. *See* ISCR Case No. 95-0611 (May 2, 1996) at p. 2 (Directive presumes there is a nexus or rational connection between proven conduct under any of its Criteria and an applicant's security eligibility).

12. "A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States.

13. "Contact and correspondence with foreign citizens are casual and infrequent."

14. "Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities."