DATE: November 28, 2000

In Re:

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

Applicant for Security Clearance

ISCR Case No. 99-0480

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Claude R. Heiny issued a decision, dated December 15, 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 erred in his application of Guideline B (Foreign Influence); and (2) whether the Administrative Judge's conclusions under Guideline C (Foreign Preference) are arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated August 19, 1999. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence). A hearing was held on November 18, 1999. The Administrative Judge issued a written decision, dated December 15, 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 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 to the Board. By memorandum dated September 27, 2000, the Board advised the parties that each had been given the opportunity to respond to the September 1, 2000 letter and that no further submissions would be accepted by the Board.

Administrative Judge's Findings

Applicant was born in a foreign country (FC 1). Applicant lived in FC 1 from his birth until 1967, when his family moved to another foreign country (FC 2). In 1979, Applicant came to the United States to get an education. He decided to stay permanently in the United States. He has lived in the United States since 1979.

Applicant received a bachelor's degree, a master's degree, and a Ph.D. from U.S. universities. Applicant became a naturalized U.S. citizen in 1991 and got a U.S. passport, which he renewed in 1998. Applicant and his wife (a naturalized U.S. citizen) have five children, who all were born in the United States. Applicant has voted in various U.S. elections, owns a house and has a bank account in the United States. He also teaches at a local community college. Applicant and his wife do not own any property or have any financial interests in a foreign country.

In 1985, Applicant visited his family which was then living in FC 2. In 1992, Applicant got an FC 1 passport, which he renewed in 1998. Applicant's wife had an FC 1 passport, which she allowed to expire in 1996. In 1992 and twice in 1998, Applicant visited his family in FC 1. On those occasions, Applicant used his U.S. passport to enter and exit FC 1. Applicant has never visited FC 1 for the purpose of fulfilling FC 1 citizenship requirements or obligations.

Applicant has not used his FC 1 passport to travel. FC 1 adult males are subject to two years of military service or must pay for an exemption from military service. All FC 1 adult males of eligible age who have not completed their military service or have not paid for an exemption from military service cannot leave FC 1 without a travel permit. A valid FC 1 passport is required to get such a travel permit. Applicant has maintained his FC 1 passport solely to allow him to get the travel permit necessary to leave FC 1. Applicant renewed his FC 1 passport in 1998 because he had to do so to get the travel permit needed to leave FC 1.

By the end of 1999, Applicant will reach the age where he will be exempt from FC 1's military service requirement. Since Applicant will no longer require a travel permit to exit FC 1, he has decided to let his FC 1 passport expire. Applicant does not want to surrender his FC 1 passport to FC 1 officials because he believes that doing so would raise questions and could affect his relatives in FC 1. Applicant wants to allow his FC 1 passport to simply expire because that would not result in the FC 1 government asking questions or investigating. At the hearing, Applicant offered to surrender his FC 1 passport to the federal government or the Administrative Judge.

Applicant's parents, two sisters, and mother-in-law and father-in-law currently live in FC 1. Applicant's father and father-in-law were government employees in FC 2. They are now retired and live in FC 1. Applicant has a brother who lives in FC 2 and a sister who lives in another foreign country (FC 3). Applicant has infrequent contacts with his brother and sisters, in the form of short telephone calls and a few letters or cards each year on special occasions such as the birth of children or religious events. None of Applicant's relatives currently work for a foreign government. Applicant has a goal of bringing his parents to live with him permanently in the United States. Applicant does not desire to return to any foreign country except to visit his relatives.

Administrative Judge's Conclusions

Applicant's contacts with his relatives overseas are infrequent and minimal. None of Applicant's relatives are connected

with a foreign government. Applicant's immediate family would not constitute an unacceptable security risk.

Applicant offered a reasonable and credible explanation for his possession of an FC 1 passport. Applicant has never traveled on his FC 1 passport and does not intend to use it for travel. Applicant will no longer need to get a travel permit when he leaves FC 1. Applicant intends to let his FC 1 passport expire. Applicant has expressed a willingness to surrender his FC 1 passport to Department Counsel or to the DOHA Administrative Judge. Applicant's taking of the oath of allegiance when he became a naturalized U.S. citizen is evidence of his willingness to renounce his FC 1 citizenship. Applicant's speculation that FC 1 officials might ask questions and cause problems for Applicant or his relatives in FC 1 is not sufficiently defined to be conduct that makes him vulnerable to coercion, exploitation, or pressure from a foreign government.

The Administrative Judge entered formal findings in favor of Applicant with respect to Guideline B (Foreign Influence) and Guideline C (Foreign Preference) and concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Appeal Issues[(1)]

1. Whether the Administrative Judge erred in his application of Guideline B (Foreign Influence). Department Counsel challenges the Administrative Judge's favorable conclusions under Guideline B. In support of this contention, Department Counsel argues: (a) the Judge erred by applying Foreign Influence Mitigating Condition 5; (b) the Judge misapplied Foreign Influence Mitigating Condition 1; and (c) the Judge placed an improper burden of proof on Department Counsel by requiring Department Counsel to prove by direct evidence that Applicant is vulnerable to coercion or pressure from a foreign government.

(a) Foreign Influence Mitigating Condition 5 (E2.A2.1.3.5).[(2)] Department Counsel argues the Administrative Judge erred by applying this Mitigating Condition because: (i) the SOR did not allege that Applicant has any foreign financial interests that might undermine his suitability for a security clearance; and (ii) the absence of foreign financial interests is not apposite to the security significance of Applicant's ties of affection with his relatives in FC1.

Department Counsel's first argument lacks merit. Whether an Administrative Judge can apply a particular Foreign Influence itigating Condition does not turn on what is specifically alleged in the SOR issued to Applicant, but on what the record evidence shows. *See* ISCR Case No. 98-0507 (May 17, 1999) at p. 8 (even though SOR did not allege applicant had financial interests in a foreign country, it was not arbitrary or capricious for the Judge to consider whether to apply Foreign Influence Mitigating Condition 5 when there was record evidence relevant to that Mitigating Condition). Given the record evidence about Applicant's financial interests, it was not arbitrary or capricious for the Judge to consider and apply Foreign Influence Mitigating Condition 5.[(3)]

Department Counsel's second argument is not persuasive. Unlike the case cited in Department Counsel's appeal brief (ISCR Case No. 98-0507, May 17, 1999) in support of its second argument, there is no indication in this case that the Administrative Judge tried to rely on Foreign Influence Mitigating Condition 5 to conclude that Applicant had extenuated or mitigated the security significance of his family ties in FC 1.

(b) Foreign Influence Mitigating Condition 1 (E2.A3.1.3.1).[(4)] Department Counsel argues the Administrative Judge erred by applying this Mitigating Condition because: (i) the Judge cited and applied any earlier version of this Mitigating Condition; and (ii) the Judge failed to give proper consideration to the record evidence concerning the nature and significance of Applicant's family ties in FC 1, including Applicant's expressed concerns about how his actions could have an adverse effect on his relatives in FC1.

Department Counsel correctly notes that the Administrative Judge cited an earlier version of Foreign Influence Mitigating Condition 1 in his decision. It was arbitrary, capricious, and contrary to law for the Judge to cite and rely on an earlier version of that Mitigating Condition. *See* ISCR Case No. 99-0557 (July 10, 2000) at p. 4 n.2.

Department Counsel correctly notes that under the current version of Foreign Influence Mitigating Condition 1 an Administrative Judge's analysis does not end with a determination that an applicant's immediate family members "are

not agents of a foreign power." The Judge's erroneous application of an earlier version of this Mitigating Condition resulted in an incomplete analysis of an important aspect of this case. *Cf.* ISCR Case No. 99-0154 (December 27, 1999) at p. 3 (noting that failure to consider an important aspect of a case can be illustrative of an arbitrary and capricious decision).

(c) Burden of proof. Department Counsel contends the Administrative Judge placed an impermissible burden of proof on the government when the Judge concluded "Applicant's speculation that [FC 1] officials might ask questions and possibly cause problems for himself or his family members is insufficiently defined to be conduct which makes the individual vulnerable to coercion, exploitation, or pressure from a foreign government." In support of this contention, Department Counsel argues that the Judge impermissibly placed on the government a burden of proving by direct evidence that Applicant is vulnerable to coercion or pressure from a foreign government.

In general, direct or objective evidence of nexus is not required before the government can deny or revoke access to classified information. *Gayer v. Schlesinger*, 490 F.2d 740,750 (D.C. Cir. 1973). And Department Counsel correctly notes that the Board has held "Department Counsel need not present direct or objective evidence that affirmatively proves the applicant is vulnerable to coercion or undue influence, but it does need to present evidence that demonstrates the applicant has engaged in conduct or is in a situation that, as a matter of common sense raises the kinds of security concerns covered by Criterion B." ISCR Case No. 98-0507 (May 17, 1999) at p. 4 (citations omitted). The Administrative Judge in this case acted in an arbitrary and capricious manner by focusing only on Applicant's conduct and ignoring the facts and circumstances of Applicant's situation concerning his family ties in FC 1. Even if the Judge concluded that Applicant's personal conduct did not give rise to security concerns under Guideline B (Foreign Influence), the Judge still had to consider whether the facts and circumstances surrounding Applicant's family ties in FC 1 placed Applicant in a situation that raises security concerns under Guideline B. It was error for the Judge to fail to do so. Once Department Counsel has demonstrated that Applicant's circumstances raise a security concern under the Guidelines of the Directive, Applicant has the burden of demonstrating extenuation or mitigation of that security concern.

Applicant argues that he would promptly report to the proper authorities any attempt by persons or organizations in FC 1 to approach or contact him for information, favors or any other action by him.[(5)] Applicant's willingness to do so is proper and commendable. However, the federal government need not wait until Applicant is actually approached or contacted by any FC 1 person or organization before it can decide whether to deny or revoke Applicant's access to classified information in light of all the facts and circumstances of Applicant's conduct and situation.

2. Whether the Administrative Judge's conclusions under Guideline C (Foreign Preference) are arbitrary, capricious, or contrary to law. Department Counsel contends the Administrative Judge's favorable conclusions under Guideline C are arbitrary, capricious, or contrary to law because: (a) the Judge misapplied Foreign Preference Mitigating Condition 4; (b) the Judge erred in his application of Foreign Preference Mitigating Condition 2; and (c) the Judge failed to give proper consideration to Applicant's possession and use of an FC 1 passport after he became a naturalized U.S. citizen.

(a) Foreign Preference Mitigating Condition 4 (E2.A3.1.3.4).[(6)] Department Counsel argues the Administrative Judge misapplied this Mitigating Condition because the significance of the oath of allegiance Applicant took when he became a naturalized U.S. citizen is rebutted by Applicant's actions and statements after he took that oath.

It was not arbitrary or capricious for the Administrative Judge to note that Applicant's taking of the oath of allegiance when he became a naturalized U.S. citizen "is evidence of his intent to renounce the citizenship of [FC 1]" (Decision at p. 7). *See, e.g.*, ISCR Case No. 99-0452 (March 21, 2000) at p. 7 (Board decision citing 8 U.S.C. Section 1448 and prior Board decisions on point). However, Department Counsel correctly notes there is record evidence that after Applicant became a naturalized U.S. citizen he engaged in actions indicative of a possible foreign preference (*i.e.*, obtained and used an FC 1 passport) and made statements indicating he may be unwilling to renounce his FC 1 citizenship. Did the Judge's failure to specifically discuss the evidence cited by Department Counsel constitute legal error? The Board concludes Department Counsel's argument about itigating Condition 4 falls short of rebutting the presumption that a Judge considers all the record evidence unless the Judge specifically states otherwise.

(b) Foreign Preference Mitigating Condition 2 (E2.A3.1.3.2).[(7)] Department Counsel argues the Administrative Judge

erred by applying this Mitigating Condition because Applicant obtained and used an FC 1 passport after he became a naturalized U.S. citizen. Department Counsel's argument has merit. Given Applicant's possession and use of an FC 1 passport after he became a naturalized U.S. citizen, the Judge had no rational basis for applying this Mitigating Condition.

(c) Possession and use of FC 1 passport. Department Counsel argues the Administrative Judge failed to give due consideration to the following: (i) Applicant is able to travel without difficulty by using his U.S. passport, (ii) Applicant's expressed reason for possessing and using an FC 1 passport is no longer valid; and (iii) Applicant's fear about the possible action the FC 1 government might take if he returned his FC 1 passport shows he is in a position to be influenced or pressured to act in a way that may be contrary to the interests of the United States. The Board need not address these arguments because application of the ASDC3I memo is dispositive on the issue of Applicant's possession and use of an FC 1 passport.

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. The ASDC3I memo falls within the scope of Section 5.1.

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.

With respect to the ASDC3I memo, Department Counsel contends: (1) the ASDC3I memo is dispositive of this appeal because Applicant has not surrendered his FC 1 passport; (2) DOHA personnel are not authorized to take custody of foreign passports, so Applicant's offer to give up his FC 1 passport to DOHA personnel would not be mitigating in this case; and (3) under the ASDC3I memo, the phrase "surrenders the foreign passport" means "the clearance applicant should return the passport to the authority issuing the foreign passport and that the applicant obtain documented proof of surrender or attempted surrender from the Embassy or Consulate of the foreign country which issued the passport." With respect to the ASDSC3I memo, Applicant contends: (a) the ASDC3I memo does not "address the mechanism or the documentation" of surrendering a foreign passport; (b) if he were to surrender his FC 1 passport to the issuing authority, such an action would "identify me as a potential target and could subject me to an increased level of scrutiny"; and (c) he hopes that "surrender" of the FC 1 passport can be achieved "in other equally effective but less obvious ways" such as (i) surrender of the FC 1 passport to some department of the United States Government other than DOHA if DOHA cannot accept a foreign passport; (ii) Applicant "certifiably destroy[ing]" the FC 1 passport; or (iii) Applicant placing the FC 1 passport "in certified escrow with our Security Department until it expires." Applicant asks the Board to affirm the Administrative Judge's favorable decision, to allow him the opportunity to provide proof that he no longer has the FC 1 passport, or to allow him to continue to hold a security clearance.

Applicant is correct in pointing out that the ASDC3I memo is silent on what constitutes "surrender" of a foreign passport. When faced with a word or phrase in the Directive that is not defined, the undefined word or phrase must be construed or interpreted in a reasonable manner. *See, e.g.*, ISCR Case No. 99-0201 (October 12, 1999) at p. 3. The same reasoning applies to the language of the ASDC3I memo. Given the legal nature of a passport,[(8)] the Board concludes that surrender of a passport would be achieved by returning the passport to the issuing authority (or whatever other person or entity is authorized by law), not by giving the passport to a third party or entity. To use an analogy, a person with a driver's license cannot be said to "surrender" it by giving it to a person or entity that is not the authority that issued the driver's license (or another person or entity authorized by law to accept the surrender of a driver's license). Accordingly, Applicant's offer to give the FC 1 passport to DOHA or another department of the United States Government, to place it in escrow with the security department of his defense contractor employer, or to destroy the FC 1 passport, does not satisfy the terms of the ASDC3I memo.[(9)]

Applicant's stated intention to allow his FC 1 passport to expire in 2002 and not renew it does not diminish the current security significance of his possession of the FC 1 passport.

Applicant also argues that if he were to surrender his FC 1 passport to the issuing authority, such an action would

"identify me as a potential target and could subject me to an increased level of scrutiny." This argument raises a challenge to the wisdom or desirability of the guidance set forth in 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, Items E3.1.28 - E3.1.35. Nothing in the Directive gives the Board the jurisdiction or authority to pass judgment on the wisdom or desirability of guidance provided by the ASDC3I. Accordingly, the Board does not have the jurisdiction or authority to address this argument made by Applicant.

Because Applicant has not surrendered his FC 1 passport, the Board need not address Department Counsel's argument about what type or kind of proof an applicant must present to demonstrate the applicant has surrendered a foreign passport under the terms of the ASDC3I memo.

The record evidence shows that Applicant possessed and used an FC 1 passport. There is no record evidence that Applicant's possession and use of an FC 1 passport was officially approved by the United States Government. Furthermore, the record evidence shows that Applicant continues to possess the FC 1 passport and he has not surrendered it. Given the applicability of the ASDC3I memo, the Administrative Judge's favorable conclusions and formal findings about Applicant's possession and use of an FC 1 passport must be reversed.

Applicant argues that he has not engaged in conduct that would fall under Foreign Preference Disqualifying Conditions 3 (E2.A3.1.2.3) through 9 (E2.A3.1.2.9). Applicant's argument does not mean that a favorable security clearance must be made in his case. A security clearance decision does not turn merely on the number of Disqualifying Conditions that may or may not be applicable in a particular case. The fact that Applicant did not engage in certain kinds of conduct with negative security significance under Guideline C (Foreign Preference) does not preclude consideration of the security significance of the conduct he has engaged in or other pertinent facts and circumstances of Applicant's case.

Applicant also notes that he has been discreet about the nature of his job and the details of his work, and that he has not disclosed to any FC 1 person the degree of his association with defense contracting work or his access to classified information. Such favorable information does not mandate a favorable security clearance decision. Even in the absence of any security violations by an applicant, the government may consider whether there are any facts or circumstances that would warrant a decision to deny or revoke access to classified information. *See, e.g.*, ISCR Case No. 99-0712 (August 29, 2000) at pp. 2-3.

Conclusion

Department Counsel has met its burden of demonstrating error that warrants reversal. Accordingly, pursuant to Item E3.1.33.3, the Board reverses the Administrative Judge's December 15, 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. On appeal, Applicant makes many statements about his conduct and his present situation that reflect evidence presented during the proceedings below. Under the Directive, the Board does not weigh the record evidence *de novo* and make its own findings and conclusions about a case. Rather, the Board addresses the material issues raised by the parties to determine whether an Administrative Judge has made factual or legal error. *See* Directive, Additional Procedural Guidance, Item E3.1.32.

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

3. Because the Board concludes the Administrative Judge did not err by applying Foreign Influence Mitigating Condition 5, we need not address Applicant's argument on this aspect of the case.

4. "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"

5. Applicant's proffer is similar to the language of Foreign Influence Mitigating Condition 4 (E2.A2.1.3.4)("The individual has promptly reported to proper authorities all contacts, requests, or threats from persons or organizations from a foreign country, as required").

6. "Individual has expressed a willingness to renounce dual citizenship"

7. "Indicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship"

8. A passport is a legal document issued by a country for use in traveling abroad. *See, e.g.*, definition of "passport" in *Black's Law Dictionary* (6th edition, West Publishing Co., 1990) at p. 1124.

9. The Board notes that the holder of an FC 1 passport is cautioned not to allow his or her FC 1 passport to "pass into the possession of any unauthorised person" and to immediately report its loss or destruction to the issuing authority or the nearest FC 1 consulate or consular authority. *See* Applicant Exhibit E, last page.