DATE: January 3, 2001

In Re:

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

Applicant for Security Clearance

ISCR Case No. 99-0457

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge John G. Metz, Jr., issued a decision, dated March 14, 2000, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board affirms 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.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge erred by not concluding that Applicant's possession and use of a foreign passport were extenuated or mitigated; and (2) whether Foreign Influence Mitigating Condition 1 is illegal and improperly discriminates against Applicant because of his national origin and family ties.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated July 30, 1999 to Applicant. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence).

A hearing was held on October 27, 1999. The Administrative Judge issued a written decision, dated March 14, 2000, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Applicant's appeal from the Judge's adverse 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 letter dated October 11, 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) in 1955. In 1973, Applicant came to the United States on a student visa. He married a U.S. citizen in 1975. He graduated from college in 1979 and became a naturalized U.S. citizen in later 1979. He and his wife have a daughter who was born in the United States.

Applicant has a substantial financial investment in the United States. Applicant has a more than satisfactory work record. Applicant's former supervisor and two coworkers consider him to be a good employee.

Applicant's brother and sister are naturalized U.S. citizens. Applicant's parents live in FC. Applicant's aunts, uncles, and cousins also live in FC.

In 1992, Applicant obtained an FC passport. Applicant used the FC passport to enter and leave FC in 1995 and 1997 to visit his parents. Applicant cannot enter or leave FC with his U.S. passport. Applicant planned to visit his parents in FC again in late 1999 despite a public warning by the U.S. State Department against such travel by U.S. citizens. In its warning, the State Department noted that U.S. citizens of FC origin had been detained and harassed by FC authorities. Applicant intends to travel to FC approximately every two years to visit his parents. Applicant used his U.S. passport for travel overseas on all occasions except when he entered and left FC.

The law of FC permits renunciation of FC citizenship only with the prior permission of its government. FC does not recognize non-FC citizenship when an FC citizen obtains it without first complying with the requirements of FC law concerning renunciation of FC citizenship. Although Applicant is a naturalized U.S. citizen, the FC government would consider him an FC citizen. Applicant does not intend to formally renounce his FC citizenship because doing so would leave him unable to travel to FC and because he fears retaliation against his parents by the FC government.

Administrative Judge's Conclusions

Applicant applied for an FC passport knowing that he could not travel to FC except as an FC citizen. Regardless of the requirements of FC law concerning the use of an FC passport to visit that country, it was Applicant's choice to travel to FC. Although a decision whether to travel to FC would be a difficult one for Applicant, it is no less a voluntary choice by him.

Applicant's oath of allegiance when he became a naturalized U.S. citizen is powerful evidence of a preference for U.S. citizenship. However, Applicant's conduct undercuts his claim to preferring U.S. citizenship. Applicant demonstrated a preference for FC when he obtained and used an FC passport after becoming a naturalized U.S. citizen. Applicant's intention to continue to travel to FC requires him to maintain his FC citizenship.

Applicant's parents, living in FC, present a potential pressure point for Applicant. Applicant fears retaliation against his parents if he were to formally renounce his FC citizenship or if the FC government were to discover his dislike of the current regime. There is insufficient record evidence to conclude Foreign Influence Mitigating Condition 1 can be applied to Applicant's parents.

Applicant does not have sufficiently close contacts with or ties of obligation with his aunts, uncles, and cousins in FC to conclude they pose an unacceptable security risk, and Applicant's sister is now a U.S. citizen. Accordingly, formal findings are entered in favor of Applicant with respect to SOR paragraphs 2.b. and 2.c.

Applicant's exercise of his FC citizenship after he became a naturalized U.S. citizen, and his unwillingness to formally renounce his FC citizenship, present an unacceptable level of risk that he is or may be subject to foreign influence and foreign preference.

The Administrative Judge entered formal findings against Applicant with respect to SOR paragraphs 1.a., 1.b., and 2.a. and concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Appeal Issues[(1)]

1. Whether the Administrative Judge erred by not concluding that Applicant's possession and use of a foreign passport were extenuated or mitigated. Applicant challenges the Administrative Judge's adverse conclusions about his exercise of dual citizenship and his possession and use of an FC passport. In support of this contention, Applicant argues: (a) he has pledged allegiance to the United States; (b) his holding of an FC passport does not make him an FC citizen; (c) he only traveled to FC to visit his parents after his father became ill; (d) the only way he could visit his parents was for him to get and use an FC passport; (e) his use of an FC passport to enter and leave FC is the most prudent and safe measure he could take under all the circumstances; (f) his use of an FC passport is only a "tool" he used "to ensure the maximum amount of safety for my family and me"; (g) he informed his company management and security department before every trip he made to FC; (h) his security department told him to contact them immediately upon his returning to the United States if anyone approached him for information about his work, but did not tell him anything else about his traveling to FC; (i) he was not aware that his traveling to FC would jeopardize his security clearance; (j) the State Department warning against traveling to FC was a general warning and at the time Applicant was in FC a U.S. sports team also was in FC; and (k) he uses his U.S. passport to travel to and from the United States, and uses his FC passport only to enter and leave FC. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge erred.

The Administrative Judge correctly noted that Applicant took an oath of allegiance to the United States when he became a naturalized U.S. citizen. However, the weight to be given to that favorable evidence is not determined in isolation, but rather must be based on consideration of the record evidence as a whole. The act of taking the oath of allegiance and becoming a naturalized U.S. citizen does not preclude consideration of an applicant's conduct and circumstances afterwards. *See* ISCR Case No. 99-0511 (December 19, 2000) at pp. 7-8 (under whole person concept, Administrative Judge must consider nature and seriousness of applicant's ties to a foreign country that continued long after applicant became a naturalized U.S. citizen). Accordingly, it was not arbitrary or capricious for the Judge to consider the security implications of Applicant's conduct and circumstances after he became a naturalized U.S. citizen.

The Administrative Judge did not erroneously find that Applicant's holding of an FC passport makes him an FC citizen. Rather, the Judge found that Applicant was born in FC and, under the law of FC, Applicant is considered to be an FC citizen even though he is naturalized U.S. citizen.

It weighs in Applicant's favor that he told his security department about his trips to FC before he took them. However, the actions of a defense contractor's security department are not binding on the federal government and do not preclude the government from making security clearance decisions based on its assessment of the security significance of an applicant's conduct and circumstances. Accordingly, the fact that Applicant reported his intentions to travel to FC to his company's security department did not preclude the Administrative Judge from considering the overall facts and circumstances of Applicant's case and making an adverse security clearance decision.

Applicant's other arguments are interrelated and raise two related claims: he had no practical alternative to getting and using an FC passport to visit his parents in FC, and he acted reasonably and prudently for the safety of himself and his family by getting and using an FC passport. We will discuss each claim separately.

Applicant's first claim raises a variation of what the Board has referred to in past cases as a claim of legal necessity. The Board has held 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. However, that Board precedent has been superseded by the ASDC3I memo and is no longer viable. *See* ISCR Case No. 99-0295 (October 20, 2000) at pp. 6-7 (explaining how ASDC3I memo supersedes prior Board rulings on legal necessity); ISCR Case No. 99-0454 (October 17, 2000) at p. 5 and n.5 (same). *Accord* ISCR Case No. 99-0511 (December 19, 2000) at p. 12. The ASDC3I memo makes clear that it is DoD policy that possession and use of a foreign passport are security disqualifying and can be mitigated only if "the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government." In this case, the record evidence shows Applicant possesses an FC passport which he has used to enter and leave FC, and that he intends to continue using an FC passport to visit his parents in FC. Application of the ASDC3I memo mandates an adverse security clearance decision under the particular facts of this case.

Applicant's second claim could be construed as challenging the wisdom or desirability of the guidance provided by 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 judgment on the wisdom or desirability of guidance provided by the ASDC3I. *See* ISCR Case No. 99-0480 (November 28, 2000) at p. 8. Therefore, the Board does not have the jurisdiction or authority to address this part of Applicant's appeal arguments.

2. Whether Foreign Influence Disqualifying Condition 1 is illegal and improperly discriminates against Applicant because of his national origin and family ties. Applicant asserts: (a)

Foreign Influence Disqualifying Condition 1[(2)] could raise "a significant and insurmountable obstacle to the ability of citizens of the United States from receiving security clearances since this is in fact a nation of Immigrants with ties to citizens of foreign countries across a broad spectrum of individuals"; (b) uniform application of Foreign Influence Disqualifying Condition 1 would preclude any citizen with foreign ties from getting a security clearance; and (c) application of Foreign Influence Disqualifying Condition 1 in this case would discriminate against Applicant "based on my heritage and family ties, which is illegal."

The Administrative Judge's adverse conclusions under Guideline B (Foreign Influence) are not based on Applicant's heritage. Furthermore, the Judge's adverse conclusions under Guideline B are not based merely on Applicant's family ties. Rather, the Judge's adverse conclusions under Guideline B are based on his assessment that Applicant's ties with his parents in FC pose a security risk under the particular facts of this case. Considering the record as a whole, the Judge's adverse conclusions under Guideline B are not arbitrary, capricious, or contrary to law.

Applicant's assertions also challenge the wisdom and legality of Foreign Influence Disqualifying Condition 1. As noted earlier in this decision, the Board's authority is limited in nature. The Board does not have the jurisdiction or authority to entertain challenges to the wisdom or legality of provisions of the Directive. *See* DISCR Case No. 90-0208 (October 24, 1991) at p. 6 (no Board authority to hold that Directive is unconstitutional); DISCR Case No. 89-0760 (July 18, 1990) at pp. 2-3 (same). *Cf. Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994)(adjudication of constitutionality of statutes is beyond the jurisdiction of administrative agencies). Accordingly, the Board cannot entertain Applicant's claims about the wisdom or legality of Foreign Influence Disqualifying Condition 1.

Conclusion

Applicant has failed to meet his burden of demonstrating error below. Accordingly, the Board affirmed the Administrative Judge's arch 14, 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. Applicant's appeal brief contains some factual assertions about matters that go beyond the record evidence below. Those statements constitute new evidence, which the Board cannot consider on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. The Board will consider arguments made by Applicant which refer to matters that are covered by the record evidence.

2. "An immediate family member or a person to whom the person has close ties of affection or obligation is a citizen of, or resident or present in, a foreign country."