DATE: November 29, 2000

In Re:

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

Applicant for Security Clearance

ISCR Case No. 99-0481

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Martin H. Mogul, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Darlene Lokey Anderson issued a decision, dated December 8, 1999, in which she 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 Applicant is being subjected unfairly to disparate treatment; (2) whether the government's case against Applicant is based on a speculative scenario; (3) whether Applicant's security clearance can be denied or revoked now based on facts and circumstances that were known to the government since 1996; and (4) whether Applicant really needs a security clearance to perform his duties.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated August 2, 1999 to Applicant. The SOR was based on Guideline B (Foreign Influence) and Guideline C (Foreign Preference). A hearing was held on October 27, 1999.

The Administrative Judge issued a written decision, dated December 8, 1999, in which she 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. Department Counsel and Applicant made submissions. By letter dated November 3, 2000, the Board advised the parties that the case was ready for disposition 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 and lived there until he emigrated to the United States in 1979. During a visit to FC in 1986, Applicant met a woman who he married six months later. Applicant became a United States citizen in 1989. Applicant's wife is currently applying for U.S. citizenship. They have a minor daughter who was born in the United States.

Applicant does not own real estate or a bank account in FC, and he does not expect to inherit anything in FC. Since 1990, Applicant's FC passport contains restrictions that do not allow him to own property, work, or stay longer than four months in FC. Other than performing one year of mandatory military service in FC in 1977, Applicant has had no association with FC's government or political system.

Applicant has held an FC passport since he emigrated to the United States. He renewed his FC passport in 1996. Applicant also possesses a U.S. passport. Since 1979, Applicant has traveled to FC on five or six occasions to visit his mother and other immediate family members. Applicant uses his FC passport to enter and exit FC. He believes that it would be impossible for him to get a visitor's visa to enter FC as a U.S. citizen because he was born in FC. Applicant states he would have no problem relinquishing his FC passport, but he is unable to do so immediately because of his ailing mother's condition.

Applicant testified that he prefers the United States over FC and that he is willing to renounce his FC citizenship because it does not mean much to him.

Applicant's mother, father, four sisters, two brothers, six brothers-in-law, a mother-in-law, and nieces are all citizens of FC and live there. Applicant's parents are retired. None of his family members are affiliated with the government of FC. Applicant stays in reasonably close contact with his mother and telephones her once a month.

Administrative Judge's Conclusions

Under the particular circumstances of this case, Applicant has not demonstrated that his expressed willingness to renounce his FC citizenship is sincere. Applicant chooses to not apply for a visitor's visa when visiting FC and instead, for his convenience, uses his FC passport when he visits FC. Applicant's exercise of his FC citizenship is security disqualifying.

Applicant's ties with immediate family members in FC and his contacts with them do not constitute an unacceptable security risk.

The Administrative Judge entered formal findings for Applicant with respect to Guideline B (Foreign Influence), but against Applicant with respect to Guideline C (Foreign Preference), and concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Appeal Issues

1. Whether Applicant is being subjected unfairly to disparate treatment. Applicant asserts that many people in his technical profession were born in foreign countries or are first-generation Americans and asks whether every immigrant is being deemed too risky to be employed. Applicant also asserts that many professionals with security clearances that he has worked with are in a situation similar to his and asks whether they are being considered to be risks to the projects they work on. Applicant also asks whether any one country or nationality is being singled out and whether his case is being fairly looked at. Applicant's questions raise the issue of whether he is being subjected unfairly to disparate treatment.

As a preliminary matter, Applicant's assertions about the circumstances of other professionals go beyond the record evidence. As such, those assertions constitute new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

Even if there were record evidence about the matters covered by Applicant's assertions about the circumstances of other professionals, neither a Hearing Office Administrative Judge nor this Board would have the jurisdiction or authority under the Directive to: (a) adjudicate the manner in which DOHA personnel decide to issue or not issue SORs in cases involving Guideline B (Foreign Influence) or Guideline C (Foreign Preference); (b) to order DOHA personnel to issue or not issue SORs in cases involving Guideline B or Guideline C; or (c) dismiss an SOR. Lacking such jurisdiction or authority, the merits of Applicant's assertions cannot be addressed.

The decision whether or not it is clearly consistent with the national interest to grant or continue a security clearance for a particular applicant must be based on an evaluation of the facts and circumstances of each applicant's case in light of pertinent provisions of the Directive. An applicant's suitability for a security clearance is not increased or decreased based on how the cases of other applicants are being processed or handled.

2. Whether the government's case against Applicant is based on a speculative scenario. Applicant argues that: (a) Department Counsel "did not present solid proof nor establish any case that carrying a 2nd passport could be a threat to the type of work [Applicant does]"; (b) he has never had any conflict or problem that might cause his employer or supervisor "to raise a red flag"; and (c) Department Counsel's case is based on "speculating an entire scenario" that Applicant's relatives may be held against their will and Applicant may endanger security because he has an FC passport for visiting his parents in FC once every few years. Applicant's arguments fail to demonstrate the Administrative Judge erred.

(a) Making security clearance decisions is not an exact science, but rather involves making predictive judgments about a person's suitability for a security clearance based on consideration of a person's past conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988). 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). Accordingly, Department Counsel was not required to prove that Applicant's possession of an FC passport poses a "clear and present danger" to the national security. *See, e.g.*, ISCR Case No. 99-0433 (May 24, 2000) at p. 4.

(b) The absence of any security violations by Applicant does not mandate a favorable security clearance decision. The federal government need not wait until an applicant actually mishandles or otherwise fails to safeguard classified information before it can deny or revoke access to such information. *Adams v. Laird*, 420 F.2d 230, 238-39 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). In addition, the absence of any concerns raised by Applicant's employer or supervisor is not dispositive. The opinions of an applicant's employer or supervisor are not binding on federal officials who make security clearance decisions. ISCR Case No. 98-0331 (May 26, 1999) at p. 6 n.5. An Administrative Judge can have a rational basis for making an adverse security clearance decision even if an applicant's employer or supervisor does not have any concerns about the applicant getting or keeping a security clearance.

(c) Applicant's third argument is moot in part. The Administrative Judge made favorable findings and conclusions under Guideline B with respect to Applicant's family ties in FC. Those favorable findings and conclusions have not been challenged by Department Counsel and, therefore, they are not at issue on appeal. The Judge's adverse security clearance decision is based on the Judge's conclusions about Applicant's possession and use of an FC passport, not his family ties to relatives in FC.

3. Whether Applicant's security clearance can be denied or revoked now based on facts and circumstances that were known to the government since 1996. Applicant states that (a) he was open with the federal government about his situation when he completed a security clearance application in 1996 and (b) "there is no reason for the court to have second thoughts after all these years." Applicant's statement needs to be addressed in two parts.

(a) The SOR did not allege that Applicant was not candid or truthful when he completed a security clearance application in 1996. Department Counsel did not present any evidence to prove that Applicant was not candid or truthful when he completed that security clearance application. Furthermore, the Administrative Judge did not make any findings that Applicant's was not candid or truthful when he completed that security clearance application. Accordingly, whether Applicant was candid and honest with the federal government in 1996 is not at issue in this case.

(b) Applicant asserts that "there is no reason for the court to have second thoughts after all these years." Applicant's assertion raises the issue of whether his access to classified information can be denied or revoked based on information that he disclosed in his security clearance application in 1996. The answer is yes. The federal government is not equitably estopped from denying or revoking a security clearance. *See, e.g.*, ISCR Case No. 97-0195 (April 2, 1998) at p. 2 (citing prior Board decision that lists several earlier Board decisions on point). Furthermore, there is no right to a security clearance. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988). A decision to grant a security clearance to an applicant does not give the applicant any vested right or interest in keeping a security clearance. Accordingly, a prior grant of a security clearance does not preclude the federal government from considering, at a future date, whether to continue that grant or to revoke it.

The ASDC3I memo, dated August 16, 2000, 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." There is no record evidence that Applicant satisfies either condition. Application of the ASDC3I memo to Applicant's case[(1)] mandates an adverse decision even if Applicant was granted a security clearance after he completed a security clearance application in 1996.

4. Whether Applicant really needs a security clearance to perform his duties. Applicant asserts that he has never been assigned to work that requires access to classified information and that he will not be involved in such work in the future. The Board does not have authority to decide whether a security clearance is required for a particular job or position in industry. That decision is the responsibility of other components of DoD. ISCR Case No. 97-0016 (December 31, 1997) at p. 4. Accordingly, the Board lacks jurisdiction or authority to address this appeal issue.

Conclusion

Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's December 8, 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. 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.