DATE: February 23, 2001

In Re:

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

Applicant for Security Clearance

ISCR Case No. 99-0519

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Esq., Department Counsel

FOR APPLICANT

Gene R. Thornton, Esq.

Administrative Judge John G. Metz, Jr., issued a decision, dated March 3, 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 Applicant's security clearance was improperly revoked during the pendency of this appeal; (2) whether a memorandum by the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence is applicable to Applicant's case; (3) whether the Administrative Judge denied Applicant a fair and impartial determination; (4) whether the Administrative Judge's findings are not supported by substantial record evidence; (5) whether the Administrative Judge erred by not applying pertinent provisions of the Directive; (6) whether the Administrative Judge's rulings or conclusions are arbitrary, capricious, or contrary to law; and (7) whether the Board should remand the case to the Administrative Judge with instructions to reopen the record for additional evidence.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated August 24, 1999 to Applicant. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence). A hearing was held on December 14, 1999.

The Administrative Judge issued a written decision, dated March 3, 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 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.

Administrative Judge's Findings

Applicant was born in foreign country (FC) in 1960. In 1987, Applicant immigrated to the United States as the spouse of a naturalized U.S. citizen who also had been born in FC. Applicant immigrated to the United States to escape the regime in FC and raise a family in a free society. Applicant became a naturalized U.S. citizen in 1994. Applicant has two children who were born in the United States after she immigrated here. Applicant and her spouse have considerable financial investments in the United States.

Applicant received a college degree in 1995. After graduation, Applicant got a job that lasted from June 1995 until February 1997, when she was laid off after the project she was working on was completed. Before seeking new employment, Applicant decided to visit FC. She applied for a U.S. passport, which she received in June 1997. She also applied for an FC passport because FC does not recognize her naturalization as a U.S. citizen and considers her to be a FC citizen. Applicant received an FC passport in July 1997.

Before visiting FC, Applicant applied for employment with her current employer. While Applicant was enroute to FC in July 1997, the company contacted her to offer her a job. Applicant accepted the job offer and proceeded to FC, where she visited her father, two sisters, an elderly aunt, and friends. Applicant returned to the United States in early September 1997 and went to work for her current employer later that month. At that time, Applicant disclosed her dual citizenship and possession of an FC passport. Applicant did not disclose her foreign travel, an omission she attributed to a mistake.

After Applicant's 1997 trip to FC, Applicant's father and one of her sisters immigrated to the United States. Applicant's father is still an FC citizen; he has liquidated his assets in FC and has invested heavily in property in the United States. Applicant's sister has applied for permanent resident status in the United States, but is on a long waiting list. Applicant's other sister and her elderly aunt remain in FC. Applicant has a very close relationship with her elderly aunt, who Applicant considers she is obligated to care for. Although Applicant has not traveled to FC since 1997 and has no plan to do so in the future, she wants to retain her FC passport so that she can travel to FC if her elderly aunt falls ill and requires care. Applicant also wants to be able to travel to FC for her elderly aunt's funeral (when that happens), and wants to be able to help her father if he returns to FC and requires her assistance. She wants to keep her FC passport for those contingencies and intends to renew it in 2002 if it expires before those contingencies occur.

Applicant considers that she renounced her FC citizenship when she became a naturalized U.S. citizen, but recognizes that FC does not accept that renunciation. Applicant has not pursued formal renunciation of her FC citizenship.

Applicant's supervisors consider her a good employee and have no reason to doubt her allegiance to the United States.

Administrative Judge's Conclusions

The Government has established its case under Guideline C (Foreign Preference). Applicant's conduct belies her claim to prefer her U.S. citizenship over her FC citizenship. Applicant's oath when she became a naturalized U.S. citizen, which includes renunciation of her FC citizenship, is powerful evidence of a preference for U.S. citizenship. The fact that Applicant did not comply with the citizenship renunciation requirements of FC would not ordinarily affect the analysis of Applicant's preference. However, Applicant reasserted her FC citizenship and her preference for that citizenship when she applied for, received, and used an FC passport to travel to FC in 1997.

Applicant knew that FC did not recognize her U.S. citizenship and would not permit her to travel to FC as a U.S. citizen. Applicant applied for an FC passport knowing that she could not travel there except as an FC citizen. The fact that FC law requires Applicant to use an FC passport to travel to FC does not obscure the fact that the choice whether to travel to FC was Applicant's to make. Applicant's decision to travel to FC was no less voluntary merely because it would have been a difficult choice for her to not travel there.

Applicant's dual citizenship is not based merely on her birth in FC, but on her active assertion of her citizenship rights in FC. Applicant asserted those rights after she became a naturalized U.S. citizen. Although Applicant's conduct is lawful, there is no evidence that it is sanctioned by the United States. Applicant's conditional willingness to renounce her FC citizenship can be given little weight under the particular facts of this case. Initially, Applicant was willing to renounce her FC citizenship conditioned on her retaining inheritance rights in FC and retaining her right to travel to FC. Now, there are no assets in FC subject to inheritance by Applicant, but she wants to retain the right to travel to FC on an emergency basis. None of the Guideline C (Foreign Preference) mitigating conditions applies.

Applicant appears vulnerable to foreign influence. While Applicant's father and one of her sisters have now been granted permanent resident status in the United States, her other sister and her aunt remain in FC. Applicant's aunt is not a member of her immediate family, but Applicant has close ties of affection with her aunt. There is insufficient information about Applicant's family members in FC to conclude they do not constitute an unacceptable security risk. Foreign Influence Mitigating Condition 1 does not apply.

Applicant and her spouse have substantial investments in the financial and community life of the United States. Their two sons are U.S. citizens by birth. Applicant has a more than satisfactory work record. However, serious doubts are cast on Applicant's fitness for access to classified information by her demonstrated conduct in reasserting her FC citizenship so soon after acquiring U.S. citizenship, her unwillingness to renounce her FC citizenship, and the risk that she may be subject to foreign influence.

Appeal Issues

1. Whether Applicant's security clearance was improperly revoked during the pendency of this appeal. Applicant contends her security clearance was improperly revoked during the pendency of this appeal because it was revoked without compliance with Directive, Section 6.4. or Directive, Item E2.2.5.6. The Board will address the provisions cited by Applicant separately.

Directive, Section 6.4. Section 6.4 covers suspension of access to classified information in cases where "there is a reasonable basis for concluding that an applicant's continued access to classified information poses an imminent threat to the national interest." Significantly, Section 6.4 deals with suspension actions taken by the ASDC3I, not security clearance adjudications by DOHA Administrative Judges. There is no indication in the record that Section 6.4 was invoked by the ASDC3I in Applicant's case.[(1)] Furthermore, nothing in the Directive indicates or suggests that Section 6.4 is the sole mechanism for denial or revocation of an applicant's access to classified information. In view of the foregoing, Applicant's reliance on Section 6.4 is misplaced.

Directive, Item E2.2.5.6.[(2)] Applicant is correct in noting the Administrative Judge's decision does not contain any findings that fall under the terms of Item E2.2.5.6. However, the Judge's decision does not recommend that Applicant's security clearance decision be suspended. Rather, the Judge's decision is an adjudication on the merits of Applicant's security eligibility. Actions taken to revoke an applicant's access to classified information after issuance of an adverse decision by a DOHA Administrative Judge (Directive, Additional Procedural Guidance, Item E3.1.27) are taken by

DoD personnel outside the scope of the Board's jurisdiction and authority. *See* Directive, Additional Procedural Guidance, Item E3.1.28 ("The applicant or Department Counsel may appeal *the Administrative Judge's clearance decision* by filing a written notice of appeal with the Appeal Board . . . .")(italics added). *See also* Directive, Additional Procedural Guidance, Item E3.1.32 (Board shall review the Judge's findings, determine whether the Judge adhered to procedures required by Executive Order 10865 and the Directive, and determine whether the Judge's rulings or conclusions are arbitrary, capricious, or contrary to law).

Lacking jurisdiction and authority in the matter, the Board cannot address the merits of Applicant's contention about the revocation of her security clearance after the Administrative Judge's decision was issued. *Cf.* ISCR Case No. 99-0454 (October 17, 2000) at p. 3 n. 1 ("Because the Administrative Judge concluded he lacked authority to act, he had no legally supportable basis for discussing the merits of the issues raised by his November 1, 1999 order. Once a Judge concludes he or she lacks authority to act, the Judge should merely explain how the Judge decided the threshold question of his or her authority."). Furthermore, lacking jurisdiction and authority in this matter, the Board cannot provide Applicant with the relief she requests in connection with this aspect of her appeal.

2. Whether a memorandum by the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence is applicable to Applicant's case. Applicant contends the ASDC3I memo should not be applied to her case because: (a) the ASDC3I memo has the practical effect of re-writing Guideline C without due process of law; (b) the ASDC3I memo articulates a standard that says nothing about Applicant's fitness for a security clearance and everything about FC; (c) the ASDC3I memo elevates administrative expediency over a rational decision under Directive, Section 6.3; (d) the ASDC3I memo sets forth an interpretation of Guideline C that is not apparent on the face of that Guideline and, therefore, creates "secret law" at odds with the Due Process Clause of the U.S. Constitution; and (e) the ASDC3I memo leaves open and unanswered at least three very serious questions as to how Applicant could obtain the benefit of the Guideline C mitigating conditions.[(3)]

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 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. 99-0424 (February 8, 2001) at p. 5; 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.

To the extent Applicant's arguments raise questions about the wisdom of the ASDC3I memo, the Board cannot address them. 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. 99-0424 (February 8, 2001) at p. 6; ISCR Case No. 99-0457 (January 3, 2001) at p. 5; ISCR Case No. 99-0480 (November 28, 2000) at p. 8. Furthermore, nothing in the Directive gives the Board the authority or discretion to ignore or disregard guidance provided by the ASDC3I pursuant to Section 5.1. of the Directive. Applicant's invocation of the oath of office taken by federal officials adds nothing to her argument. The federal oath of office is not an independent source of jurisdiction or authority for the Board or its members.

Applicant argues the ASDC3I memo does not answer three questions: what constitutes surrender of a foreign passport; to whom does an applicant surrender a foreign passport; and what constitutes an appropriate agency of the United States Government. The record below shows Applicant possesses an FC passport and has indicated she intends to keep it to allow her the ability to travel to FC under certain circumstances. Accordingly, the Board need not address what constitutes surrender of a foreign passport to decide this appeal. The Board does not issue advisory opinions. *See* ISCR Case No. 99-0452 (March 21, 2000) at p. 6. Accordingly, the Board need not address the third question to decide this appeal.

Applicant argues that her possession and use of an FC passport does not reflect a preference for FC over the United States, but rather the fact that she has no choice but to comply with the law of FC when traveling there. Applicant correctly notes the Board has issued decisions that address claims of legal necessity in foreign passport cases. However, Applicant's reliance on those decisions is misplaced. The ASDC3I memo supersedes any prior decision by Hearing Office Administrative Judges or the Board to the extent the decision is inconsistent with the guidance provided by the ASDC3I memo. *See* ISCR Case No. 99-0424 (February 8, 2001) at pp. 5-6; ISCR Case No. 99-0601 (January 30, 2001) at p. 10; ISCR Case No. 99-0457 (January 3, 2001) at p. 5. Accordingly, the ASDC3I memo is dispositive on Applicant's legal necessity arguments.

3. Whether the Administrative Judge denied Applicant a fair and impartial determination. Applicant contends she was denied a fair and impartial determination in her case because of various rulings by the Administrative Judge. For the reasons that follow, the Board concludes this contention is not persuasive.

Applicants are entitled to a fair and impartial adjudication of their cases. Directive, Section 4.1; Section 6.3.; Additional Procedural Guidance, Item E3.1.10. A fair and impartial adjudication is an important right that touches upon the basic integrity of DOHA proceedings. *See, e.g.*, ISCR Case No. 99-0068 (November 30, 1999) at p. 2; ISCR Case No. 98-0066 (February 9, 1999) at pp. 5-6. However, there is no presumption of error below, and the appealing party has the burden of demonstrating error on appeal. *See, e.g.*, ISCR Case No. 99-0447 (July 25, 2000) at p. 2. Furthermore, there is a rebuttable presumption that quasi-judicial officials are fair and impartial, and an appealing party has a heavy burden of persuasion when seeking to overcome that presumption. *See, e.g.*, ISCR Case No. 99-0462 (May 25, 2000) at p. 3.

The mere fact that an Administrative Judge found against a party is insufficient to demonstrate the Judge was prejudiced or biased. *See, e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at p. 5. Accordingly, the fact that the Judge made an adverse security clearance decision in this case is insufficient to demonstrate he denied Applicant a fair and impartial adjudication.

Applicant also argues the Administrative Judge was argumentative in his questioning of her at the hearing. A Judge has broad discretion to question witnesses at a hearing. A review of the hearing transcript passages cited by Applicant shows that her counsel did not object to the Judge's questions. Because Applicant did not object to the Judge's questions at the hearing, Applicant cannot fairly complain about those questions on appeal. Furthermore, even if the Board were to assume solely for the sake of deciding this appeal that Applicant had not waived any objection to the Judge's questions, a review of the hearing transcript passages cited by Applicant does not persuade the Board that the Judge's questions were outside the scope of his discretion or that they demonstrate he was biased against Applicant.

Applicant's arguments fail to demonstrate she was denied a fair and impartial adjudication of her case based on various alleged errors by the Administrative Judge. Even if a party can demonstrate the Judge committed factual or legal error, such a showing would not translate into a demonstration that the Judge was prejudiced or biased. *See, e.g.*, ISCR Case No. 98-0515 (March 23, 1999) at p. 5.

4. Whether the Administrative Judge's findings are not supported by substantial record evidence. Applicant contends various findings by the Administrative Judge are not supported by substantial record evidence. Specifically, Applicant argues the Judge erred by finding: (a) Applicant is a dual citizen of FC and the United States since her naturalization in 1994; (b) Applicant's father and both her sisters still reside in FC; and (c) Applicant did not disclose to the government that she had recently traveled to FC.

(a) The Administrative Judge did not err by finding that Applicant is a dual citizen of FC and the United States. That finding is supported by the record evidence in this case. The record evidence shows that Applicant is an FC citizen by birth and that, under FC law, she is an FC citizen despite her naturalization as a U.S. citizen in 1994. Applicant's status as an FC citizen is based on FC law, independent of her actions. Accordingly, it is untenable for Applicant to argue that she should not be considered a dual citizen for the period between her naturalization as a U.S. citizen in 1994 and when she applied for an FC passport in 1997. The Judge's finding on this point is not erroneous.

(b) Applicant correctly notes SOR paragraph 2.a. alleges that Applicant's father, two sisters, and an aunt are citizens of FC and reside in FC. Applicant also correctly notes the Administrative Judge entered a formal finding against her with respect to SOR paragraph 2.a. However, those two correct observations do not demonstrate the Judge erred by finding

that Applicant's father and both sisters still reside in FC. Applicant's argument is based on a misleading characterization of the Judge's decision.

The Board does not review isolated sentences or passages of an Administrative Judge's decision. Rather, the Board considers the Judge's decision as a whole to determine what findings were made and conclusions reached by the Judge. *See, e.g.*, ISCR Case No. 99-0554 (July 24, 2000) at p. 4 n.2; ISCR Case No. 97-0699 (November 24, 1998) at p. 4. The Judge specifically found that Applicant's father and one of her sisters immigrated to the United States after Applicant's 1997 trip to FC. Furthermore, in evaluating Applicant's case under Guideline B (which is predicated on SOR paragraph 2.a.), the Judge specifically noted that Applicant's father and one of her sisters had immigrated to the United States, and focused on the one sister and aunt who remained in FC. Considering the Judge's decision as a whole, Applicant's argument is untenable.

(c) The Administrative Judge found Applicant did not disclose her travel to FC when she applied for a security clearance in 1997 and indicated Applicant attributed the omission to a mistake. Applicant contends the Administrative Judge erred by making that finding and argues it was violative of due process for the government to use an unsigned and unauthenticated document (Government Exhibit 1) to impeach Applicant when signed documents in the government's possession would have shown Applicant has disclosed her travel to FC when she applied for a security clearance.

Applicant's objection to Government Exhibit 1 on appeal is untimely. At the hearing, Government Exhibit 1 was entered into evidence without objection from Applicant. The hearing transcript passage cited by Applicant on appeal does not support her claim that she challenged the weight to be given to Government Exhibit 1. The cited passage indicates Applicant was asked questions by her counsel about Government Exhibit 1, including its preparation. The cited passage does not contain any objection by Applicant's counsel to the admission of Government Exhibit 1 or any argument about its weight. Having failed to object to the admissibility of Government Exhibit 1 at the hearing, Applicant cannot now complain that the document was admitted into evidence and considered by the Administrative Judge. *See, e.g.*, ISCR Case No. 98-0123 (October 28, 1998) at p. 2.

Apart from Applicant's waiver of any objection to the admission of Government Exhibit 1, the challenged finding by the Administrative Judge (which appears in a brief footnote) does not appear to be relied on by the Judge in his analysis of Applicant's case. As discussed earlier in this decision, the Board does not review isolated sentences or passages of a Judge's decision. Considering the challenged finding in the context of the Judge's decision as a whole, the Board concludes the challenged finding is tangential to the Judge's findings and conclusions under Guideline B and Guideline C. Accordingly, even if the Board were to assume solely for the sake of deciding this appeal that the challenged finding is erroneous, that error would be harmless. *See, e.g.*, ISCR Case No. 00-0244 (January 29, 2001) at p. 6; ISCR Case No. 98-0657 (November 16, 1999) at p. 3.

5. Whether the Administrative Judge erred by not applying pertinent provisions of the Directive. Applicant contends the Administrative Judge erred by not applying certain provisions of the Directive. Specifically, Applicant argues: (a) the factors set forth under Directive, Item E2.2.1 must be resolved in her favor; (b) the Judge erred by not applying certain Foreign Preference (Guideline C) mitigating conditions or certain Foreign Influence (Guideline B) mitigating conditions; (c) the Judge failed to apply Directive, Item E2.2.5; and (d) the Judge's analysis does not comply with the whole person analysis required by the Directive.

(a) Directive, Item E2.2.1. Applicant contends that a review of the facts and circumstances of her case under the Item E2.2.1 factors demonstrates it is clearly consistent with the national interest to continue her access to classified information. None of Applicant's arguments as to each of the Item E2.2.1 factors articulates how the Administrative Judge is supposed to have erred. Rather, Applicant's arguments about the Item E2.2.1 factors set forth her interpretation of the record evidence and her assertion that consideration of each of those factors "must be resolved in favor of Applicant."

As discussed earlier in this decision, there is no presumption of error below and the appealing party has the burden of demonstrating error. Applicant's arguments concerning the Item E2.2.1 factors fail to raise any specific claim as to how the Administrative Judge erred with respect to application of the Item E2.2.1 factors. Rather, Applicant's arguments about the Item E2.2.1 factors appear to ask the Board to consider those factors and make a *de novo* decision as to

Applicant's security eligibility. Under the Directive, the Board does not review an applicant's case *de novo*. Rather, the Board is limited to reviewing a Judge's decision under the terms of Directive, Additional Procedural Guidance, Item E3.1.32. Applicant has failed to meet her burden on appeal of making a specific claim as to how the Judge erred with respect to the Item E2.2.1 factors. *See, e.g.*, ISCR Case No. 99-0295 (October 20, 2000) at pp. 3-4 (appealing party must raise claims of error with specificity, not merely assert a Judge erred without specifying how the Judge supposedly erred).

Applicant also argues that the Administrative Judge's adverse decision "simply cannot be squared with numerous decisions of DOHA approving security clearances for other naturalized U.S. citizens." Applicant does not cite any specific DOHA decisions in support of this argument. If Applicant is referring to decisions by other Hearing Office Administrative Judges, those decisions would not be binding on the Judge or on the Board. *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 5. Furthermore, by not identifying specific DOHA decisions in support of this argument, Applicant leaves the Board unable to determine: (i) whether Applicant relies on any decision that might be persuasive authority, or (ii) whether Applicant relies on any decision that is distinguishable. To the extent Applicant's argument relies on DOHA decisions concerning legal necessity in foreign passport cases that predate the ASDC3I memo, it lacks merit for the reasons set forth earlier in this decision.

(b) Foreign Preference and Foreign Influence mitigating conditions. Applicant contends the Administrative Judge erred by concluding that no Foreign Preference or Foreign Influence mitigating conditions applied to Applicant's case. Applicant claims the Judge should have applied certain Foreign Preference and Foreign Influence Mitigating Conditions. Applicant also contends the Administrative Judge applied Foreign Preference Mitigating Conditions 1 and 4 in a manner that " had a discriminatory impact on Applicant."

(b)(i) Foreign Preference Mitigating Condition 1.[(4)] Applicant argues the Administrative Judge erred by concluding Foreign Preference Mitigating Condition 1 was not applicable because she applied for an FC passport after becoming a naturalized U.S. citizen. Applicant's contention has some merit, but it does not demonstrate harmful error under the particular facts of this case.

When the Administrative Judge issued his decision in this case, there was Board precedent that indicated his interpretation of Foreign Preference Mitigating Condition 1 was a permissible one. A few weeks later, the Board issued a decision in which it changed its position concerning the interpretation and application of Foreign Preference Mitigating Condition 1. *See* ISCR Case No. 99-0452 (March 21, 2000) at pp. 2-3. Accordingly, the Judge's reasoning concerning Foreign Preference Mitigating Condition 1 would be sustainable if the Board had not changed its position on the interpretation and application of Foreign Preference itigating Condition 1.

The Board has declined to ignore its change of position on Foreign Preference Mitigating Condition 1 in cases where the Administrative Judge's decision was issued before the Board's decision in ISCR Case No. 99-0452 and the appeal was adjudicated after that Board decision. *See* ISCR Case No. 99-0601 (January 30, 2001) at pp. 11-12; ISCR Case No. 99-0597 (December 13, 2000) at p. 8. However, the change in the Board's position on Foreign Preference Mitigating Condition 1 does not warrant reversal or remand in this case. The Judge's adverse security clearance decision is sustainable on grounds that would not be affected by the application of Foreign Preference Mitigating Condition 1. Accordingly, a reversal would not be warranted and no useful purpose would be served by remanding this case to the Administrative Judge for his application of Foreign Preference Mitigating Condition 1.

(b)(ii) Foreign Preference Mitigating Condition 4.[(5)] Applicant contends the Administrative Judge erred by not applying Foreign Preference Mitigating Condition 4. In support of this contention, Applicant argues: she renounced her FC citizenship when she became a naturalized U.S. citizen; FC does not recognize the renunciation of FC citizenship when an FC-born citizen becomes a naturalized U.S. citizen; and the Judge erred by concluding Applicant preferred FC citizenship because she did not seek to go through the onerous procedures established by FC to formally renounce FC citizenship.

Applicant correctly notes that renunciation of foreign citizenship is part of the oath of allegiance taken when a person becomes a naturalized U.S. citizen. *See, e.g.*, ISCR Case No. 99-0452 (March 21, 2000) at p. 7. However, Applicant's renunciation of her FC citizenship when she became a naturalized U.S. citizen is not conclusive or dispositive evidence

in a foreign preference case. The government is entitled to consider the security significance of an applicant's conduct and circumstances after the applicant takes the oath of allegiance and becomes a naturalized U.S. citizen. *See* ISCR Case No. 99-0424 (February 8, 2001) at p. 12.

Applicant obviously cannot be held responsible for FC's refusal to recognize the renunciation of FC citizenship when an FC-born citizen becomes a naturalized U.S. citizen. *See* ISCR Case No. 98-0592 (May 4, 1999) at pp. 6-7. Nothing in the Administrative Judge's decision indicates or suggests that the Judge was holding Applicant responsible for FC's policy. Rather, the Judge was correctly noting that FC's refusal to recognize Applicant's renunciation of her FC citizenship when she became a naturalized U.S. citizen has the practical effect that Applicant cannot travel to FC without an FC passport.

Given the record evidence that Applicant retains an FC passport because she wants to retain the ability to travel to FC in the future under some circumstances and has indicated an intention to renew the FC passport if necessary to retain the ability to travel to FC, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to conclude Foreign Preference Mitigating Condition 4 is not applicable. And, even if the Board were to assume solely for the sake of deciding this appeal that Applicant was entitled to have the Judge apply Foreign Preference Mitigating Condition 4 the Judge's failure to do so would be harmless error under the particular facts of this case.

(b)(iii) Discriminatory impact. Applicant argues the Administrative Judge applied Foreign Preference Mitigating Conditions 1 and 4 in a manner that, "in the language of Title VII jurisprudence . . . had a discriminatory impact on Applicant just because she happened to be born in [FC] as opposed to a country that recognizes U.S. citizenship." A security clearance adjudication is made under Executive Order 10865 and the Directive to determine whether it is clearly consistent with the national interest to grant or continue security clearances for an applicant. It is not the proper forum for an applicant to raise federal civil rights claims. *See, e.g.*, ISCR Case No. 99-0454 (February 8, 2001) at p. 6 ("Neither Hearing Office Administrative Judges nor the Board has the jurisdiction or authority to adjudicate claims under federal civil rights statutes."). Accordingly, the Board will not address Applicant's argument on this claim.

(b)(iv) Foreign Influence Mitigating Condition 1.[(6)] Applicant contends the Administrative Judge should have applied Foreign Influence Mitigating Condition 1. In support of this contention, Applicant argues: the Judge arbitrarily disregarded Applicant's testimony without any indication or finding that her testimony was not credible; the government never challenged the truth of Applicant's testimony; and a fair-minded and impartial person would have little difficulty concluding Applicant's family members in FC are not agents of the FC government and are not in a position to be exploited by the FC government to put pressure on Applicant. Applicant's arguments fail to demonstrate the Judge erred.

An Administrative Judge is not compelled to accept the testimony of a witness merely because it is unrebutted. *See, e.g.*, ISCR Case No. 99-0005 (April 19, 2000) at p. 3. A Judge is not required to accept a witness's testimony at face value merely because Department Counsel does not specifically attack it at a hearing. Furthermore, even if an Administrative Judge considers an applicant's testimony to be credible, such a favorable credibility determination does relieve the Judge of the obligation to consider what reasonable inferences and conclusions can be drawn from such testimony. *See, e.g.*, ISCR Case No. 99-0601 (January 30, 2001) at pp. 5-6. And, a Judge cannot consider an applicant's testimony in isolation; rather the Judge must consider it in light of the record evidence as a whole. Moreover, an applicant's opinion as to the security significance of the applicant's conduct or circumstances is not dispositive and does not relieve a Judge of his or her responsibility to evaluate the applicant's security eligibility. *See, e.g.*, ISCR Case No. 99-0601 (January 30, 2001) at p. 9. Accordingly, Applicant's testimony is not dispositive, as a matter of law, on whether Foreign Influence Mitigating Condition 1 should be applied in her case.

There is no record evidence that Applicant's relatives in FC are agents of a foreign power. However, that does not end the analysis under Foreign Influence Mitigating Condition 1. *See* ISCR Case No. 99-0511 (December 19, 2000) at p. 10 (discussing bifurcated nature of Foreign Influence Mitigating Condition 1). The Judge still had to consider whether Applicant's relatives in FC are in a position to be exploited by a foreign power.

Department Counsel does not have the burden of disproving the applicability of Foreign Influence Mitigating Condition 1. Rather, Applicant has the burden of presenting evidence to demonstrate the applicability of that mitigating condition. *See, e.g.*, ISCR Case No. 99-0601 (January 30, 2001) at p. 7 (discussing Department Counsel's and applicant's burdens

of proof); ISCR Case No. 99-0597 (December 13, 2000) at p. 7 (same). In this case, Applicant argues for a plausible interpretation of the record evidence concerning her family ties in FC. However, Applicant's ability to make such an argument falls short of demonstrating the Judge acted in an arbitrary or capricious manner. The Judge expressed a doubt whether there was sufficient record evidence about Applicant's family members in FC to conclude they do not constitute an unacceptable security risk. Considering the record evidence as a whole, the Board cannot conclude the Judge lacked a rational basis for his expressed doubt. Given that doubt, the Judge did not err by resolving it in favor of the national security. *See*, Directive, Item E2.2.2.("Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.")

(b)(v) Foreign Influence Mitigating Condition 3.[(7)] Applicant contends the Administrative Judge should have given her some credit for mitigating circumstances along the lines of Foreign Influence Mitigating Condition 3. In support of this contention, Applicant argues: she has not traveled to FC since she was granted a security clearance; she has no plans to travel to FC; her contacts with persons in FC have become more attenuated since her father and one of her sisters immigrated to the United States; and Applicant has made clear she would travel to FC only on an emergency basis and then only if her sister in FC were not able to handle the emergency by herself.

The fact that Applicant's trip to FC in 1997 occurred before she was granted a security clearance does not have the significance that Applicant places on it. Security clearance decisions are not limited to consideration of an applicant's conduct and circumstances while the applicant holds a security clearance. *See, e.g.*, ISCR Case No. 99-0601 (January 30, 2001) at pp. 12-13. Furthermore, the security significance of Applicant's 1997 trip to FC cannot be evaluated separate and apart from the record evidence that Applicant continues to hold an FC passport and has indicated that she would use an FC passport to travel to FC in the future under some circumstances.

Applicant correctly notes her contacts with persons in FC were reduced when her father and one sister immigrated to the United States. However, that evidence does not negate or diminish the security significance of Applicant's remaining contacts with her other sister and an elderly aunt in FC, especially when viewed in light of her retention of an FC passport and her expressed willingness to use an FC passport to travel to FC in the future under some circumstances.

Considering the record as a whole, Applicant has failed to demonstrate it was arbitrary or capricious for the Administrative Judge to not apply Foreign Influence Mitigating Condition 3.

(b)(vi) Foreign Influence Mitigating Condition 5.[(8)] Applicant contends the Administrative Judge should have applied Foreign Influence Mitigating Condition 5. In support of this contention, Applicant argues: her financial interests in FC have diminished and no longer exist; and Applicant has substantial financial assets in the United States.

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). In this case, there is record evidence Applicant had inheritance rights in FC while her father lived there. However, the Judge specifically found Applicant's father had immigrated to the United States and liquidated his assets in FC. Furthermore, the Judge found Applicant had substantial financial investments in the United States. The Judge's adverse conclusions about Applicant's vulnerability to foreign influence did not rely, expressly or implicitly, on her past financial interests in FC. Accordingly, even if the Board were to conclude the Judge should have applied Foreign Influence Mitigating Condition 5, such an error would be harmless because it pertains to a matter that was not outcome determinative.

(c) Directive, Item E2.2.5. Applicant contends the Administrative Judge failed to consider the factors set forth in Directive, Item E2.2.5. Applicant specifically argues: (i) she gave truthful and complete answers to questions put to her (E2.2.5.1); (ii) she sought professional guidance of her supervisor and legal counsel upon receiving notice that DOHA proposed to revoke her security clearance (E2.2.5.2); and (iii) there is nothing in the record or the Judge's findings to suggest that she should have her security clearance suspended pending final adjudication of her case (E2.2.5.6).

Applicant's honesty and candor with the government weigh in her favor, but they are not dispositive. The fact that an

applicant provides full and truthful answers does not preclude the government from evaluating the security significance of the applicant's answers. *See, e.g.*, ISCR Case No. 99-0601 (January 30, 2001) at p. 9.

Applicant's reliance on Item E2.2.5.3 is misplaced. The Board construes Item E2.2.5.3. as dealing with situations where an applicant seeks and follows professional guidance in connection with the conduct or circumstances underlying the SOR allegations. Item E2.2.5.3. does not deal with an applicant seeking and following professional guidance in connection with a security clearance adjudication itself.

The Board has already discussed Applicant's reliance on Item E2.2.5.6 and need not repeat its discussion of that matter here.

(d) Whole person concept. Applicant correctly notes Directive, Item E2.2.1 indicates the need to use the whole person concept in adjudicating security clearance cases. However, as discussed earlier in this decision, Applicant's arguments concerning the Item E2.2.1 factors fail to demonstrate the Administrative Judge erred. Furthermore, the evidence cited by Applicant did not compel the Judge to issue a favorable security clearance decision. A Judge must consider the record evidence, both favorable and unfavorable, and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. *See, e.g.*, ISCR Case No. 00-0044 (December 22, 2000) at p. 3. As discussed earlier in this decision, the Board does not review an applicant's case *de novo*. Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law.

6. Whether the Administrative Judge's rulings or conclusions are arbitrary, capricious, or contrary to law. Applicant contends the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. In support of this contention, Applicant argues: (a) there is no justification for the Judge's adverse decision in light of the fact that Applicant was granted a security clearance by the government a couple of years ago when it had knowledge of the fact that she had an FC passport and had recently returned from a trip to FC; (b) neither the government nor the Judge explained what justification there is for revoking a security clearance it granted to Applicant only two years earlier; and (c) Applicant's security clearance was revoked after the Judge's decision without compliance with Directive, Section 6.4 or Directive, Additional Procedural Guidance, Item E2.2.5.6.

The SOR issued to Applicant placed her on notice of the facts and circumstances relied on by the government to contend that she should not have a security clearance. Beyond the explicit requirements of Executive Order 10865, Section 3.(1) and Directive, Section 4.3.1., Department Counsel is not required to explain or justify the reasons why an SOR was issued to her. The Judge's decision in this case sets forth his findings and conclusions and his reasons for concluding it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant clearly disagrees strongly with the Judge's adverse decision. However, that disagreement does not demonstrate the decision below fails to provide an explanation for the Judge's adverse decision.

Applicant's second argument appears to be predicated on an implicit notion that she is entitled to retain a security clearance based on a theory of equitable estoppel or vested rights. That argument lack merit. 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 entitlement in keeping a security clearance. 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. Furthermore, the federal government is not equitably estopped from denying or revoking a security clearance. *See, e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at p. 8; ISCR Case No. 99-0481 (November 29, 2000) at p. 5.

The Board has already addressed Applicant's arguments concerning Directive, Section 6.4 and Directive, Additional Procedural Guidance, Item E2.2.5.6. The Board need not repeat its discussion of those arguments here.

7. Whether the Board should remand the case to the Administrative Judge with instructions to reopen the record for additional evidence. Applicant asks the Board to reverse the Administrative Judge's adverse decision. For the reasons set forth in this decision, the Board concludes Applicant has failed to demonstrate error that warrants reversal. Applicant asks, in the alternative, that the Board remand the case to the Judge with instructions that he reopen the record to receive additional evidence pertinent to Applicant's disclosure to the Defense Security Service of the fact of her travel to FC

when she initially applied for a security clearance, and to direct Department Counsel to produce documentary evidence in its possession relevant to that matter. As discussed earlier in this decision, the Judge's finding about Applicant's disclosure of her trip to FC is tangential to the Judge's findings and conclusions under Guideline B and Guideline C and is, at most, harmless error. Accordingly, no useful purpose would be served by remanding this case for the purpose requested by Applicant.

Conclusion

Applicant has failed to meet her burden of demonstrating error that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's March 3, 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 Board notes its jurisdiction under the Directive does not extend to review of any decisions by the ASDC3I. *See* Directive, Additional Procedural Guidance, Items E3.1.28 through E3.1.35. Accordingly, an appeal before the Board would not be a proper forum for challenging a decision by the ASDC3I to suspend a security clearance pursuant to Directive, Section 6.4.

2. "E2.2.5. When information of security concern becomes known about an individual who is currently eligible for access to classified information, the adjudicator should consider whether the person: . . . E2.2.5.6. Should have his or her access temporarily suspended pending final adjudication of the information."

3. Applicant also asserts she has not received adequate notice or a meaningful opportunity to respond to the ASDC3I memo because: (1) she was not provided a copy of a Defense Security Research Center finding referred to in the ASDC3I memo; and (2) she was not provided with a copy of a cover memo from the Director, DOHA on the ASDC3I memo. Applicant's first point is irrelevant. DOHA proceedings are not a proper forum in which to debate or adjudicate the formulation of policy by the ASDC3I. Applicant's second point lacks merit because the ASDC3I memo was issued without any cover memo from the Director, DOHA.

4. "Dual citizenship is based solely on parents' citizenship or birth in a foreign country."

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

6. "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."

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

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