DATE: December 13, 2000

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In Re:

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

Applicant for Security Clearance

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ISCR Case No. 99-0597

**APPEAL BOARD DECISION AND REVERSAL ORDER**

**APPEARANCES**

**FOR GOVERNMENT**

William S. Fields, Esq., Department Counsel

**FOR APPLICANT**

***Pro Se***

Administrative Judge Kathryn Moen Braeman issued a decision, dated March 15, 2000, in which she 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 gave undue weight to Applicant's surrender of his foreign country passport after the hearing; and (2) whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

**Procedural History**

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated October 19, 1999. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence). A hearing was held on January 7, 1999. The Administrative Judge issued a written decision, dated March 15, 2000, in which she concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed the Judge's 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. By memorandum dated September 26, 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) and lived there until 1981. In 1980, Applicant married a woman from another foreign country (FC 2).

Applicant moved to the United States in 1981 because of a job opportunity. Applicant and his wife have two children who were born in the United States. Applicant and his wife became naturalized U.S. citizens in 1988. When Applicant became a naturalized U.S. citizen, he took the oath of allegiance and renounced all allegiance to foreign states. Under FC 1 law, Applicant is a dual national eligible to return to FC 1 at any time unless he makes a formal declaration of renunciation of FC 1 citizenship. Applicant has thought about renouncing his FC 1 citizenship, but has no plans to do so.

Applicant worked with a defense contractor from 1990 to 1998. Applicant had a DoD security clearance from 1990 to 1992, when it was administratively terminated. Applicant followed security guidelines when he had a security clearance. Applicant received a master's degree from a university in the United States in 1994. Applicant has worked for his current employer (another defense contractor) since 1998.

Applicant traveled for pleasure to FC 1 and FC 2, as well as two other foreign countries (FC 3 and FC 4). Applicant and his family lived in FC 3 from 1998 to 1999 while working for his company. He always used his U.S. passport when traveling overseas.

Applicant worked for an FC 1 company from 1974 to 1977 and for another FC 1 company from 1977 to 1979. Applicant is considering retirement in FC 1, but would do so as a United States citizen. Applicant may be eligible for some retirement benefits based on his work for FC 1 companies, but he does not know what benefits, if any, he might be eligible for.

In June 1998, Applicant applied for an FC 1 passport to "aid in maintaining citizenship for when I someday wish to retire to [FC 1]." Another reason for Applicant getting the FC 1 passport is so that his children could go to FC 1 to live with his parents if he and his wife both died. Applicant thought of his FC 1 passport as an "official ID card." Applicant told the Defense Security Service in August 1999 that he had no plans to use his FC 1 passport before he retires in 15 years and that he would be willing to relinquish his FC 1 passport if such an action were a condition for getting access to classified information. After the hearing, Applicant returned his FC 1 passport to the FC 1 consulate.

Applicant's mother and father are FC 1 citizens who live in FC 1. They never worked for any foreign government and now are retired. Applicant's wife has five siblings who were born in FC 2. Two of her siblings live in FC 2, two of her siblings live in FC 5, and one sibling lives in FC 1. Four of Applicant's wife's siblings are FC 2 citizens and one of an FC 1 citizen. Applicant does not have close ties of affection with his wife's siblings. In 1997 Applicant and his family visited his wife's siblings in FC 2. None of Applicant's wife's siblings are connected with any foreign government. There is little likelihood that the governments of FC 1, FC 2or FC 5 would exercise influence against Applicant's relatives and in-laws.

Applicant's past and current supervisors and a coworker indicated Applicant is very honest, trustworthy, reliable, and dependable. A friend and neighbor of Applicant testified that Applicant has outstanding character, reliability, commitment, and loyalty to his family, community, employer and the United States.

## Administrative Judge's Conclusions

Applicant obtained his FC 1 passport only as a contingency plan to protect his children should he and his wife both die. Applicant did not intend to use his FC 1 passport. Applicant has used only his U.S. passport for overseas travel. Applicant's decision to get an FC 1 passport was a mistake because his preference is exclusively for the United States, not for FC 1. Applicant has mitigated the security concerns because his dual citizenship is based solely on his birth in FC 1 or his parents' FC 1 citizenship.[(1)] Department Counsel asserts that Applicant should be disqualified under Foreign Preference Disqualifying Condition 4 (E2.A3.1.2.4),[(2)] but there is no evidence that he accepted any benefits from FC 1 since he became a U.S. citizen in 1988 or that he will receive such benefits in the future. Applicant's return to FC 1 to retire is speculative. Applicant has not exercised any rights or privileges of his FC 1 citizenship since he became a naturalized U.S. citizen. Applicant is now and would continue to maintain his principal loyalty to the United States. There is little probability, if any, that Applicant will act in preference to FC 1 over the United States.

Applicant's ties with his wife's siblings are infrequent and tangential. The security concerns raised by Applicant's ties of affection with his parents and other relatives in foreign countries are mitigated by the fact that those relatives have no ties to foreign governments. There is little likelihood that Applicant's foreign relatives would exercise foreign influence. The government has presented no evidence that Applicant might be subjected to duress or risk of compromise of classified information because of his ties to his parents or his wife's sisters. Applicant's family ties do not raise concerns that they might make Applicant vulnerable to coercion, exploitation or pressure through threats against his foreign relatives.

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

## Appeal Issues[(3)]

1. Whether the Administrative Judge gave undue weight to Applicant's surrender of his foreign country passport after the hearing. At the hearing, Applicant stated that he intended to return his FC 1 passport to the FC 1 consulate after the hearing. The Administrative Judge overruled Department Counsel's objections and granted Applicant seven days to submit evidence to document that he had in fact returned his FC 1 passport to the FC 1 consulate.

Department Counsel contends the Administrative Judge gave undue weight to Applicant's surrender of his FC 1 passport after the hearing. In support of this contention, Department Counsel argues: (a) Applicant failed to surrender his FC 1 passport until after the hearing despite the fact that the SOR put him on notice that possession of that passport could lead to denial of a security clearance; (b) Applicant did not disclose a definite plan to surrender his FC 1 passport until he was prompted by the Judge at the hearing; (c) the Judge gave too much weight to Applicant's explanation that he kept the FC 1 passport so he could show it to the Judge to demonstrate it had not been used by him; and (d) Applicant's decision to give up his FC 1 passport does not diminish the significance of Applicant's motivation for getting an FC 1 passport, Applicant's decision to exercise his FC 1 citizenship by getting an FC 1 passport, or Applicant's decision to retain his FC 1 citizenship.[(4)]

Nothing in the Directive specifically authorizes or precludes the post-hearing submission of documents. However, an Administrative Judge does not have unfettered discretion in deciding whether to allow a post-hearing submission. An Administrative Judge's decision about allowing a post-hearing submission can be reviewed to determine whether it was arbitrary, capricious, or otherwise an abuse of discretion. *See* Directive, Additional Procedural Guidance, Item E3.1.32.3. *See also* ISCR Case No. 98-0676 (August 15, 2000) at p. 2. In deciding whether to allow a party to make a post-hearing submission of a document that does not exist at the time of the hearing, a Judge must do so in a fair, impartial and even-handed manner (Directive, Section 4.1; Additional Procedural Guidance, Item E3.1.10) and must consider whether doing so could result in any potentially serious drawbacks. *See* ISCR Case No. 98-0676 (August 15, 2000) at pp. 2-3.[(5)]

Department Counsel relies on the Board's decision in ISCR Case No. 99-0154 (December 27, 1999) in support of its contention that the Administrative Judge erred by allowing Applicant to make a post-hearing submission in this case.

ISCR Case No. 99-0154 is distinguishable from this case. In ISCR Case No. 99-0154, the record evidence showed that the applicant had no intention of resolving or addressing his delinquent debts for at least another two years until the Judge strongly suggested to the Applicant that he take certain remedial action after the hearing. Such "coaching" of an applicant to take remedial actions did not reflect fair and impartial action by the Judge. *Cf.* ISCR Case No. 98-0685 (May 20, 1999) at p. 3 (a party cannot expect an Administrative Judge to act as a surrogate advocate and help that party develop or bolster its case). As Applicant correctly notes, the record shows that at the hearing Applicant expressed his intention to relinquish his FC 1 passport immediately after the hearing and the Judge did not "prompt" the Applicant to take that step. Department Counsel's argument to the contrary is not well-founded. Considering all the circumstances, the Judge acted within the legitimate bounds of her discretion by allowing Applicant time to make a post-hearing submission to document his surrender of the FC 1 passport.

Applicant contends the ASDC3I memo does not apply to this case because he has surrendered his FC 1 passport. Department Counsel contends the ASDC3I memo is not dispositive because there is record evidence supporting Applicant's claim that he surrendered his FC 1 passport.[(6)] Given the record evidence that Applicant has surrendered his FC 1 passport, application of the ASDC3I memo would not mandate an unfavorable security clearance decision. However, Department Counsel persuasively argues that Applicant's security eligibility must still be determined based on a consideration of all the record evidence, including the evidence of Applicant's conduct and motivation concerning the FC 1 passport before he surrendered it.

In concluding Applicant had mitigated the security concerns raised by his acts of foreign preference, the Administrative Judge referred to several matters, including the fact that Applicant had surrendered his FC passport after the hearing. Considering the record as a whole, the Board concludes Department Counsel has not demonstrated the Judge gave undue weight to Applicant's surrender of his FC passport.

2. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. In support of this contention, Department Counsel argues: (a) the Judge imposed an improper burden of proof on Department Counsel under Guideline B; (b) the Administrative Judge erred in her application of Foreign Influence Mitigating Condition 3; (c) the Judge erred in her application of Foreign Preference Mitigating Condition 1; (d) the Judge failed to consider the security significance of Applicant's stated motivation for retaining FC 1 citizenship; (e) the Judge improperly based her decision, in part, on a loyalty determination; and (f) the Judge erred by analyzing Applicant's case in a piecemeal manner.

(a) Burden of proof. Department Counsel contends the Administrative Judge imposed an improper burden of proof on the government under Guideline B by requiring Department Counsel to present evidence to disprove Foreign Influence Mitigating Condition 1.[(7)] Department Counsel's contention has merit.

The Administrative Judge squarely placed on Department Counsel the burden of disproving Foreign Influence Mitigating Condition 1 when she stated "[t]he Government presented no evidence that because of his ties to his parents or to his wife's sisters that Applicant might be subject to duress or create a situation that could result in the compromise of classified information" (Decision at p. 8). The Judge erred in part.

Once Department Counsel has met its burden of proving controverted facts (Directive, Additional Procedural Guidance, Item E3.1.14), the burden shifts to an applicant to present evidence demonstrating extenuation, mitigation, or changed circumstances (Directive, Additional Procedural Guidance, Item E3.1.15). Department Counsel is under no duty to present evidence to disprove any Adjudicative Guidelines mitigating condition. Furthermore, an Administrative Judge cannot assume or infer that any particular mitigating condition is applicable merely because Department Counsel does not present evidence to disprove that particular mitigating condition. If the record does not contain evidence sufficient to support application of a mitigating condition,[(8)] then the applicant bears the consequence of his or her failure to satisfy his or her burden to present such evidence.[(9)]

The plain language of Guideline B (Foreign Influence) covers immediate family members *or* persons to whom the applicant has close ties of affection or obligation. *See* Guideline B, E2.A2.1.1 and E2.A2.1.2.1. Clearly, Applicant's parents in FC 1 are covered by Guideline B. However, Applicant's sisters-in-law in foreign countries are not immediate family members. *See* Directive, E2.A2.1.3.1. Therefore, Applicant has no burden of showing his sisters-in-law are covered by Foreign Preference itigating Condition 1 unless there is record evidence that he has "close ties of affection or

obligation." *See* Directive, E2.A2.1.2.1. In this case, Department Counsel did not demonstrate Applicant has close ties of affection or obligation with his sisters-in-law. Therefore, the Judge committed no error with respect to Applicant's sisters-in-law. However, the Judge improperly shifted the burden of proof to Department Counsel and gave an unsustainable rationale for applying Foreign Influence Mitigating Condition 1 with respect to Applicant's parents in FC 1.

(b) Foreign Influence Mitigating Condition 3. Department Counsel contends the Administrative Judge misapplied Foreign Influence Mitigating Condition 3 (E2.A2.1.3.3).[(10)] In support of this contention, Department Counsel argues the Judge explained her application of Mitigating Condition 3 by referring to the nature of the contacts between Applicant and his wife's siblings, yet failed to consider Applicant's contacts with his parents in FC 1. Department Counsel's argument does not demonstrate the Judge acted in an arbitrary and capricious manner. As Applicant notes, the Judge applied Mitigating Condition 3 with respect to his wife's siblings, not with respect to his parents in FC 1. At most, Department Counsel's argument shows the Judge could not give full or dispositive weight to Mitigating Condition 3, not that the Judge had no rational basis for applying it at all. Of course, the Judge's application of Mitigating Condition 3 to Applicant's wife's siblings sheds no light on the security significance of Applicant's ties with his parents in FC 1 or the foreign preference aspects of this case.

(c) Foreign Preference Mitigating Condition 1. Department Counsel contends the Administrative Judge erred by applying Foreign Preference Mitigating Condition 1 (E2.A3.1.3.1) ("Dual citizenship is based solely on parents' citizenship or birth in a foreign country"). In support of this contention, Department Counsel argues: (i) the Judge's application of Foreign Preference Mitigating Condition 1 was contrary to a prior Board decision that had been issued before the Judge issued her decision in this case; and (ii) in the alternative, even if the Judge could apply Foreign Preference Mitigating Condition 1, the Judge gave it undue weight.

(c)(i) Department Counsel correctly notes that the Administrative Judge's application of Foreign Preference Mitigating Condition 1 was contrary to an earlier ruling of the Board in another case. However, Department Counsel properly concedes that, after the Judge issued her decision in this case, the Board changed its position concerning the application of Foreign Preference Mitigating Condition 1. *See* ISCR Case No. 99-0452 (March 21, 2000) at pp. 2-3 (explaining Board's change in position). The Judge's application of Foreign Preference Mitigating Condition 1 was contrary to a then-controlling Board decision. However, since the pertinent Board ruling was modified after the Judge issued her decision in this case, it would be unwarranted for the Board to rely on its earlier ruling to conclude the Judge erred even though the Judge's action is consistent with the Board's current interpretation of Foreign Preference Mitigating Condition 1. Even if the Board were to conclude, solely for purposes of deciding this appeal, that the Judge erred at the time she issued her decision in this case, that error must be deemed harmless in light of the subsequent change in the Board's interpretation of Foreign Preference Mitigating Condition 1.

(c)(ii) Department Counsel correctly notes that application of Foreign Preference Mitigating Condition 1 is not dispositive. The application of Foreign Preference Mitigating Condition 1 does not relieve a Judge from considering the record as a whole, including Applicant's action in voluntarily obtaining an FC 1 passport in 1998. *See, e.g.*, ISCR Case No. 99-0452 (March 21, 2000) at p. 3 (weight accorded to Foreign Preference Mitigating Condition 1 must be appropriate in light of any other evidence indicative of a foreign preference). Department Counsel persuasively argues the Judge plainly erred by concluding that "Applicant has not exercised any rights or privileges of his foreign citizenship since he was naturalized as a U.S. citizen." Obtaining a foreign country passport is an act of exercising the rights or privileges of a citizen of that foreign country. And, as Department Counsel correctly notes, the fact that Applicant never used his FC 1 passport to travel does not negate the application of Foreign Preference Disqualifying Condition 1 ("Possession and/or use of a foreign passport"). *Cf.* ISCR Case No. 99-0254 (February 16, 2000) at p. 3 ("Even if an applicant has not engaged in other conduct that has more serious negative security significance, the Judge still has the obligation to evaluate the security significance of the conduct the applicant did engage in."). Department Counsel correctly notes the record evidence shows Applicant obtained an FC 1 passport for reasons that went beyond having it as a mere identification card.[(11)] It was arbitrary and capricious for the Judge to focus on the evidence that Applicant did not use his FC 1 passport for traveling overseas while ignoring evidence that Applicant obtained that passport for other reasons independently indicative of a possible foreign preference.

(d) Applicant's motivation. Department Counsel persuasively argues that the Administrative Judge failed to give due

consideration to Applicant's motivation for obtaining an FC 1 passport. Applicant's motivation for obtaining an FC 1 passport is relevant. *See* Directive, Sections 6.3.4 and E2.2.1.7. An applicant who obtains a foreign country passport in order to protect his or her ability to claim the rights and privileges of a citizen of that foreign country is demonstrating a tangible interest in exercising the rights and privileges of a citizen of that country. *See* ISCR Case No. 99-0454 (October 17, 2000) at p. 6. *Cf.* ISCR Case No. 98-0476 (December 14, 1999) at p. 5 (noting negative security significance of an applicant's expressed interest in maintaining foreign country citizenship in order to obtain financial benefits as a citizen of that country in the future). And, the absence of sinister or malevolent motives on an applicant's part does not negate or reduce the negative security significance of the applicant's actions. *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6. Accordingly, Applicant's expressed motivation for getting an FC 1 passport (*i.e.*, protecting the interests of his children and his ability to claim retirement benefits in FC 1) does not reduce or change the nature of his conduct: exercising the rights and privilege of an FC 1 citizen in order to preserve or protect his ability to claim future rights or benefits from FC 1 for himself or his family.

Furthermore, Applicant's expressed reluctance to formally renounce his FC 1 citizenship is also relevant and sheds light on his motivations. *Cf.* ISCR Case No. 98-0419 (April 30, 1999) at p. 8 ("An applicant's stated intentions concerning retention or renunciation of foreign citizenship constitute relevant and material evidence.").

Applicant notes he has never indicated an intention of giving up his U.S. citizenship. As noted earlier in this decision, even if an applicant has not engaged in other conduct that has more negative security significance, the Administrative Judge still must evaluate the security significance of the conduct the applicant did engage in. Accordingly, Applicant's observation is not dispositive under Guideline C. *Cf.* ISCR Case No. 99-0254 (February 16, 2000) at p. 3 ("[T]here is no requirement under Criterion C that the government must prove an applicant has affirmatively disavowed a preference for his or her U.S. citizenship.").

The Administrative Judge failed to articulate a rational basis for concluding Applicant's motivation for getting an FC 1 passport extenuated or mitigated his conduct.

(e) Applicant's loyalty. The Administrative Judge referred to the testimony of Applicant's neighbor that Applicant is loyal to the United States. The Judge also justified her decision, in part, by specifically finding that Applicant was "believable when he testified he is now and would continue to maintain his principal loyalty to the US." Department Counsel contends the Judge erred by making a loyalty determination about Applicant, contrary to Section 7 of Executive Order 10865.[(12)] Department Counsel's contention has merit.

Section 7 of Executive Order 10865 indicates that industrial security clearance decisions are not loyalty determinations. Accordingly, the Board has held that an Administrative Judge errs when referring to an applicant's loyalty. *See, e.g.*, ISCR Case No. 98-0252 (September 15, 1999) at p. 8. Furthermore, the Board has rejected a construction of Executive Order 10865, Section 7 that would prohibit loyalty determinations when an adverse security clearance decision is made, but not when a favorable security clearance decision is made. ISCR Case No. 99-0452 (March 21, 2000) at pp. 5-6. In view of the foregoing, the Judge erred by stating any conclusion about Applicant's loyalty and relying on it in making her security clearance decision. Applicant's argument to the contrary is not persuasive.

(f) Piecemeal analysis. Department Counsel contends the Administrative Judge engaged in a piecemeal analysis that did not take into account the totality of the record evidence of Applicant's situation. Department Counsel's contention has merit. When viewed collectively, separate events or matters can have a significance that is missing when each is evaluated in isolation. *See* ISCR Case No. 99-0122 (April 7, 2000) at p. 3. Applicant's dual citizenship, his family ties in FC 1, his conduct in getting an FC 1 passport, and his reasons for getting that foreign passport cannot be evaluated separately. Viewed as an integrated whole, those matters have meaning and significance under Guidelines B and C that go beyond the meaning and significance of each matter viewed in isolation. Considering the Judge's decision as a whole, the Judge's analysis of the facts and circumstances of Applicant's case reflects a piecemeal analysis that is contrary to the whole person analysis required by the Directive (Section E2.2.3).

**Conclusion**

Department Counsel has met its burden of demonstrating error below. The totality of the Administrative Judge's errors

warrants reversal. Therefore, pursuant to Item E3.1.33.3 of the Directive's Additional Procedural Guidance, the Board reverses the Judge's arch 15, 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 Administrative Judge also cited Foreign Preference Mitigating Condition 1 (E2.A3.1.3.1)("Dual citizenship is based solely on parents' citizenship or birth in a foreign country").

2. "Accepting educational, medical, or other benefits, such as retirement and social welfare, from a foreign country."

3. On appeal, Applicant disagrees with the statement of facts set forth in Department Counsel's appeal brief and asks the Board to rely on the hearing transcript and the exhibits. When deciding cases, the Board relies on the hearing transcript and exhibits, not a party's characterization of those documents.

4. On appeal, Applicant is concerned that some of Department Counsel's arguments are an attack on his integrity and veracity. Department Counsel's arguments are not evidence, merely Department Counsel's position on how the evidence should be interpreted. However much Department Counsel's arguments may distress Applicant, they fall within the permissible limits of zealous advocacy.

5. The Board rejects the Administrative Judge's suggestion that a practice is permissible if it "is commonplace in DOHA proceedings" (Decision at p. 3). The frequency of a practice does not determine whether it is proper or whether it is arbitrary, capricious, or contrary to law. A lawful practice is not impermissible even if it occurs rarely or infrequently. A practice that is arbitrary, capricious, or contrary to law is not rendered permissible merely because it occurs frequently. Furthermore, the Board notes the Judge improperly relied, in part, on a dissenting opinion to justify her ruling. A concurring or dissenting opinion does not limit, reduce, or diminish the legal effect of a majority Board decision.

6. On September 14, 2000, the FC 1 consulate sent a fax to the Board concerning the status of Applicant's FC 1 passport. That fax constitutes new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

7. "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."

8. If the record evidence would support application of a mitigating condition, it does not matter whether the evidence was presented by an applicant or by Department Counsel. If the evidence presented by Department Counsel would support application of a mitigating condition, then the failure of an applicant to present other evidence supporting application of that mitigating condition would not preclude an Administrative Judge from applying it.

9. Department Counsel argues, *inter alia*, "[a]n Administrative Judge cannot use the absence of any evidence on a given point to find for or against either party." That argument goes a bit too far. In general, a Judge should not draw inferences, whether favorable or unfavorable, from the absence of record evidence. DISCR Case No. 92-0711 (July 14, 1993) at p. 5. However, when a party has the burden of proof on a particular point, the absence of any evidence on that point requires the Judge to find or conclude that point against the party that has the burden of proof. *See also* ISCR Case No. 98-0419 (April 30, 1999) at p. 4 (discussing circumstances under which Administrative Judge should consider failure of a party to present corroborating evidence).

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

11. On appeal, Applicant reiterates his view (expressed during the hearing) that the FC 1 passport was like an official identification card and challenges Department Counsel's argument that a foreign passport allows the holder to present himself or herself out as other than a U.S. citizen, claiming that was not his intention. A photocopy of Applicant's FC 1 passport in the record clearly identifies Applicant as an FC 1 citizen, not a U.S. citizen. Any use of the FC 1 passport for identification would involve Applicant holding himself out as an FC 1 citizen, not a U.S. citizen. Applicant's subjective beliefs cannot override the natural, foreseeable consequences that would follow from any use of an FC 1 passport as identification.

12. "Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."