DATE: January 30, 2001

In Re:

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

Applicant for Security Clearance

ISCR Case No. 99-0601

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone. Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Barry M. Sax issued a decision, dated March 17, 2000, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed. For the reasons set forth below, the Board reverses the Administrative Judge's decision.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge's conclusions under Guideline B (Foreign Influence) are arbitrary, capricious, or contrary to law; and (2) whether the Administrative Judge's conclusions under Guideline C (Foreign Preference) are arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated November 9, 1999. The SOR was based on Guideline B (Foreign Influence) and Guideline C (Foreign Preference). A hearing was held on February 23, 2000. The Administrative Judge issued a written decision, dated March 17, 2000, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed the Judge's favorable decision.

On March 22, 2000, the Director, DOHA, issued an e-mail message that read "Effective immediately and until further notice there is an across the board moratorium on the issuance of any decisions in cases involving any dual citizenship issues. This applies to actions by security specialists, Department Counsel, Administrative Judges, and the Appeal Board." On April 11, 2000, the Director, DOHA issued an e-mail message that read "This is to provide further guidance as to the moratorium on dual citizenship cases issued on Wednesday March 22nd. Effective immediately the moratorium applies only to decisions to clear or issue an SOR by a security specialist, decisions to clear or deny by an Administrative Judge and decisions to affirm, reverse or remand by the Appeal Board in cases involving an Applicant's use and/or possession of a foreign passport." Copies of the March 22 and April 11, 2000 e-mail messages were provided to Applicant and the processing of this appeal was held in abeyance.

By letter dated September 1, 2000, the Board informed the parties that the Deputy General Counsel (Legal Counsel) had (1) provided the Board with a copy of an August 16, 2000 memorandum by the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASDC3I) entitled "Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline" (hereinafter "ASDC3I memo"), and (2) advised the Board that the moratorium imposed on March 22, 2000 had been lifted. A copy of the ASDC3I memo was provided to the parties with the September 1, 2000 letter.

Through the September 1, 2000 letter, the Board also gave both parties the opportunity to: (1) express their views on the ASDC3I memo and how it applies to this case; and (2) to respond to the other party's submission. Both parties made submissions.

Administrative Judge's Findings

Applicant is a citizen of a foreign country (FC) by birth and is a naturalized U.S. citizen. Applicant was born in FC in 1959. Applicant came to the United States in 1977 to continue his education. The FC regime was later overthrown, and Applicant's father (a police chief of a major FC city under the overthrown FC regime) went into hiding with Applicant's younger sister for two years before being able to escape FC to a neighboring country. The new FC government seized all the assets of Applicant's mother, brother, and two sisters before they fled FC. All of Applicant's immediate family (except for his wife) are now naturalized U.S. citizens.

FC does not recognize dual nationality. FC does not recognize Applicant as a U.S. citizen and considers him to be an FC citizen because he was born there. FC has a history of poor relations with the United States.

In April 1993, Applicant obtained an FC passport. The FC passport was extended through April 1999. The FC passport expired in April 1999 and has not been renewed. Before the hearing, Applicant indicated he might renew his FC passport. This is no longer the case since Applicant is willing to renounce his FC citizenship.

Applicant got the FC passport because:(a) he feared the consequences if FC authorities saw him with a U.S. passport; (b) he felt "it would have almost been impossible to go to [FC] without an [FC] passport"; (c) he would be "a target" if he visited FC without an FC passport; and (d) he felt use of an FC passport to enter and leave FC was necessary "to avoid problems and possible danger." Applicant indicated he kept his FC "citizenship and passport . . .so I can travel to [FC] if I have to." Applicant believed that he should keep a low profile while in FC to avoid any problems with the FC government and because he did not want to jeopardize the position and security of his in-laws in FC. Applicant did not get the FC passport out of preference for FC or for his convenience.

Applicant traveled to FC in May or June 1993, in September or October 1995, in May or June 1997, and from mid-December 1997 to early January 1998. On each occasion, Applicant used his FC passport to enter and leave FC. Except for entering and leaving FC, Applicant has used his U.S. passport for travel overseas since he became a naturalized U.S. citizen.

Before Applicant's 1993 trip to FC, Applicant contacted the FC interest section at another country's (FC 2) embassy in the United States. He made the contact to find out if the FC government considered him to be subject to FC military service, and to obtain an exemption that would allow him to travel to FC without being drafted by FC. While in FC during this trip, Applicant was contacted at the airport by men who identified themselves as agents of the FC government. The men asked Applicant about the current location of his father and other relative, his activities in the United States, and any relationship with an FC dissident group in FC. Applicant refused to cooperate with the men.

Before Applicant's 1995 trip, Applicant contacted the FC interest section at another country's (FC 3) embassy in the United States. He made this contact to verify that he had no FC military service obligation before his went to FC.

In the early to mid-1990s, Applicant was contacted by a man in the United States who asked if he would be willing to help the FC people. Applicant believed the man was a member of a dissident group opposed to the FC government. Applicant told the man he was not interested and he was never contacted again.

Applicant was unable to find a suitable wife in the United States. He made several trips to FC to find a woman with a

similar background to marry. Applicant's last trip to FC was to arrange for his marriage to his present wife, an FC citizen, in FC. Applicant did this because he had been unable to find a suitable wife in the United States. Applicant's wife has been in the United States for a little more than two years and is awaiting the requisite time period before applying to become a naturalized U.S. citizen. Applicant's father-in-law, mother-in-law, two brothers-in-law, and a sister-in-law live in FC. Applicant's in-laws have a private business in FC and live in a low-key manner to avoid being picked on by the FC government.

Applicant has some feelings for FC, as the country of his birth, but he has no sympathy for the current regime in FC. Applicant's U.S. citizenship is very important to him because of the freedoms he has here. Neither Applicant nor his immediate family has any intention of returning to FC. Applicant and his wife would like to visit her family and his relatives in FC in the future "when the situation is more stable."

Four witnesses (including three line supervisors) who have known Applicant for about 27 months and who work closely with him consider him to be a man of integrity who has a strong preference for the United States over FC.

Administrative Judge's Conclusions

Although Applicant has feelings for FC, the land of his birth, there is no evidence that Applicant has any feelings of affection or obligation to FC. Applicant distinguishes between the FC government and its people. Applicant has made clear, in no uncertain terms, that he dislikes and rejects the government now in place in FC. Applicant shows obvious affection for the United States and appreciation of what this country has allowed him to accomplish. Applicant's financial, political, and philosophical ties to the United States are strong and growing.

Applicant exercised FC citizenship by obtaining and using an FC passport. However, Applicant's actions in getting and using an FC passport did not demonstrate a preference for FC. Applicant did not use his FC passport for any purpose other than to enter and leave FC. Applicant was only complying with FC law out of perceived necessity, not for convenience or a preference for FC. Applicant acted out of fear of what FC authorities might do if he used his U.S. passport to enter and leave FC. Furthermore, Applicant's possession and use of the FC passport were sanctioned by the U.S. Government because his conduct was consistent with guidance provided by a State Department Consular Information Sheet on FC.

Applicant's actions in contacting the FC interest sections at two different third country embassies in the United States in 1993 and 1995 do not demonstrate any foreign preference by Applicant. Applicant's disclosure of those two incidents demonstrate a high degree of integrity, good judgment, reliability, and trustworthiness.

The incidents in which Applicant was contacted by agents of the FC government and by a representative of its opponents do not demonstrate Applicant has a preference for FC.

At the hearing, Applicant stated an unconditional willingness to renounce his FC citizenship and to relinquish his FC passport. To the extent Applicant's willingness to renounce his FC citizenship is deemed "conditional," it is still entitled to some weight.

Applicant's contacts with his in-laws and relatives in FC are casual and infrequent. There is no basis to conclude Applicant's in-laws are likely to be pressured by FC to persuade Applicant to do anything adverse to United States interests, and there is no basis for conclude there is a risk or that Applicant would accede to such pressure. The evidence that Applicant's wife is an FC citizen with parents and other siblings in FC does not, under the totality of the evidence, establish an "unacceptable security risk." The fact that Applicant's wife is an FC citizen is, by itself, of minimal security significance, and when viewed in the totality of the evidence, it does not tend to establish a risk of foreign influence.

The record lacks any specific substantial evidence, direct or indirect, that there is a risk that Applicant is likely to act adversely to United States interests. There is little or no risk that Applicant would ever fail to act appropriately in working with classified information. If pressured, Applicant would refuse to cooperate and would immediate contact appropriate U.S. authorities.

Appeal Issues

1. Whether the Administrative Judge's conclusions under Guideline B (Foreign Influence) are arbitrary, capricious, or contrary to law. Department Counsel contends the Administrative Judge's conclusions under Guideline B are arbitrary, capricious, or contrary to law. In support of that contention, Department Counsel argues: (a) the Judge improperly shifted the burden of persuasion from Applicant to the Government; and (b) the Judge erroneously relied on the absence of other Guideline B disqualifying conditions to support his conclusion that Applicant had overcome the Government's case against him.

(a) In support of its contention that the Administrative Judge improperly shifted the burden of persuasion from Applicant to the Government, Department Counsel argues: (i) the Judge erred by concluding there was a lack of evidence that Applicant has any feelings of affection or obligation to FC; (ii) the Judge improperly relied on a foreign preference analysis to reach his favorable conclusions under Guideline B, which deals with foreign influence; (iii) the Judge improperly placed the burden of persuasion on Department Counsel to prove by direct evidence that Applicant is vulnerable to coercion or pressure from a foreign government; (iv) the record evidence concerning the presence of Applicant's wife's relatives in FC and the past associations of Applicant's family with the former FC government demonstrates Applicant may be at risk for undue influence or coercion; (v) the Judge erred by concluding that the FC citizenship of Applicant's wife, by itself is of minimal security significance; and (vi) it was arbitrary and capricious for the Judge to conclude that there is no evidence that Applicant would accede to pressure from the FC government.

(a)(i) Department Counsel persuasively argues that the record evidence does not support the Administrative Judge's finding that there is no evidence that Applicant has any feelings of affection or obligation to FC. The record evidence shows Applicant has sought to distinguish between his feelings for the government of FC and his feelings for the people (including his relatives) and the culture of FC, and the Judge found Applicant was credible in his statements about that distinction. However, the Judge's acceptance of the sincerity of Applicant's distinguishing between his feelings toward the FC government and his feelings toward the people and culture of FC does not end the analysis of this aspect of the case. The deference owed to a Judge's credibility determinations (Directive, Additional Procedural Guidance, Item E3.1.32.1) does not preclude the Board from considering whether the inferences and conclusions a Judge draws from credible testimony are arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at pp. 8-9 n. 7 ("The issue is not simply whether the Administrative Judge could reasonably conclude Applicant gave credible testimony on this point. A conclusion that Applicant's statements are sincere and credible did not give the Judge *carte blanche* in deciding what inferences or conclusions can be drawn from those statements. Rather, the Judge has to make findings of fact and draw inferences and conclusions that reflect a reasonable interpretation of the evidence that takes into account the record evidence as a whole.").

The distinction between an applicant's feelings toward the government of a foreign government and the applicant's feelings toward the people and culture of a foreign country does not have much practical meaning or significance under Guideline B. The mere fact that Applicant has expressed antipathy toward the FC government is not dispositive under Guideline B. A person can be vulnerable to foreign influence without having any positive or favorable feelings toward the government of a particular foreign country. *See, e.g., Scarbeck v. United States*, 317 F.2d 546, 548-49 (D.C. Cir. 1963)(defendant pressured to work for foreign intelligence service through threats made against defendant's foreign paramour), *cert. denied*, 374 U.S. 856 (1963). For purposes of Guideline B, it does not matter whether an applicant is at risk because the applicant: (1) may be influenced through favorable feelings toward the government or regime of a foreign nation; (2) may be influenced through favorable feelings toward the people (including the applicant's relatives) and culture of a foreign nation; (3) may be influenced through a desire to avoid harm to, or to gain benefit for, his relatives in a foreign nation; or (4) some combination or variation of such concerns. *See, e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at pp. 10-11 (foreign influence issues are not limited to situations involving coercive means of influence; rather, they can include situations where an applicant may be vulnerable to noncoercive means of influence).

Accordingly, the Administrative Judge placed unwarranted weight on the significance of Applicant's distinguishing between his feelings toward the FC government and his feelings for the people and culture of FC. The record evidence of Applicant's feelings toward the people (including his relatives) and culture of FC contradicts the Judge's finding that there is no evidence that Applicant has any feelings of affection or obligation to FC. Standing alone, the Administrative Judge's error on this point might be deemed to be harmless. However, this error contributed to the Judge's failure to apply the whole person concept when evaluating Applicant's suitability for access to classified information.

(a)(ii) Department Counsel argues the Administrative Judge improperly relied on a foreign preference (Guideline C) analysis to reach his favorable conclusions under Guideline B (foreign influence). In general, a Judge should not analyze an applicant's conduct in terms of an Adjudicative Guideline different from the Adjudicative Guideline under which the conduct is alleged in an SOR. However, Department Counsel seeks to take that general proposition too far.

Under the whole person concept (Directive, Items E2.2.1 and E2.2.3), an Administrative Judge must assess the totality of an applicant's conduct and circumstances in order to evaluate the applicant's security eligibility, not just consider an applicant's conduct and circumstances in a piecemeal manner. *See, e.g.*, ISCR Case No. 99-0597 (December 13, 2000) at p. 10. In this case, there are factual and logical connections between Applicant's conduct and circumstances under Guideline B and his conduct and circumstances under Guideline C. It would violate the whole person concept to consider and evaluate the record evidence of Applicant family ties with FC citizens (including his wife), Applicant's contact with FC government officials during his 1993 trip to FC and Applicant's contact with a person associated with an FC dissident group in the mid-1990s independently of the record evidence of Applicant's exercise of dual citizenship, his possession and use of an FC passport, and his trips to FC in 1993, 1995, 1997, and 1997-1998. *See* ISCR Case No. 99-0597 (December 13, 2000) at p. 10 (noting totality of the facts and circumstances of an applicant's case should be considered under Guidelines B and C because their collective meaning and significance may go beyond the meaning and significance of each matter viewed in isolation). Given the fact that the SOR specifically alleged both Guideline B and Guideline C, given the close relationship of Guideline B and Guideline C, and given the factual and logical connections between this Applicant's conduct and circumstances under Guideline B and Guideline C, the Board is not persuaded by Department Counsel's argument that the Judge erred in the manner asserted by Department Counsel.

(a)(iii) Department Counsel's burden of proof argument is persuasive. Department Counsel has the burden of proving controverted facts. Directive, Additional Procedural Guidance, Item E3.1.14. Under Executive Order 10865 and the Directive, Department Counsel does *not* have the burden of demonstrating that it is "clearly consistent with the national interest" to deny or revoke an applicant's access to classified information. Nor does Department Counsel have the burden of proving that an applicant poses a "clear and present danger" to national security. *See, e.g.*, ISCR Case No. 99-0481 (November 29, 2000) at p. 4. An applicant has the burden of presenting evidence to rebut, explain, extenuate or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion that a favorable security clearance decision is warranted. Directive, Additional Procedural Guidance, Item E3.1.15.[(1)] Under the "clearly consistent with the national interest" standard, an applicant has a heavy burden of demonstrating extenuation or mitigation of facts with negative security significance. *See, e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at pp. 8-9; ISCR Case No. 98-0252 (September 15, 1999) at p. 7. There is no presumption in favor of granting or continuing a security clearance. *Dorfmont v. Brown*, 914 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Indeed, any doubt as to an applicant's suitability for a security clearance should be resolved in favor of the national security. Directive, Item E2.2.2.

The Administrative Judge placed an improper burden of proof on the government in several ways. First, the Administrative Judge erred by drawing adverse inferences from his observation that certain SOR allegations failed to state why Applicant's conduct or circumstances should be considered to be security disqualifying. An SOR is intended to place an applicant on fair notice of the conduct or circumstances that the government contends raises security concerns. Individual SOR allegations need not contain an explanation about why the government contends each allegation specifically demonstrates a security concern. The Judge placed an improper burden of proof on Department Counsel by imputing significance to the unremarkable fact that the SOR allegations did not try to serve any purpose beyond placing the Applicant on notice of the factual basis for the government's security concerns. Second, as discussed later in this decision, the Administrative Judge erroneously relied on the absence of other Guideline B disqualifying conditions in support of his conclusion that Applicant had overcome the government's case against him. The Judge's erroneous reasoning had the practical effect of placing an improper burden of proof on the government by implicitly requiring Department Counsel to prove more serious conduct in order to justify an adverse security clearance decision. Third, the Judge's analysis had the practical effect of requiring Department Counsel to present direct, objective evidence that specifically shows how each aspect of Applicant's conduct and ties with FC demonstrated a security concern under Guideline B. Department Counsel was not under any obligation to do so. *See Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973)(direct or objective evidence of nexus is not required before the government can deny or revoke access to classified information). Given the record evidence in this case, Applicant's conduct and circumstances raise security concerns under Guideline B that left Applicant with a heavy burden of proof under Item E3.1.15.

(a)(iv) Department Counsel's fourth, fifth, and six arguments are interrelated and can be addressed together. Under the whole person concept, an Administrative Judge must assess the totality of an applicant's conduct and circumstances in order to evaluate the applicant's security eligibility, not just consider an applicant's conduct and circumstances in a piecemeal manner. *See, e.g.*, ISCR Case No. 99-0597 (December 13, 2000) at p. 10. Although the Judge noted the need to avoid a piecemeal analysis, a reading of the decision below shows the Judge analyzed various aspects of Applicant's conduct and circumstances in a piecemeal manner that failed to adequately take into account the Judge's own findings, including the following: the history of poor relations between FC and the United States; Applicant's expressed concerns about the risks and threats he, his immediate family, and his in-laws in FC face from the FC government; and Applicant's actions to shield himself and his in-laws in FC from attracting the attention of the FC government.

(b) Department Counsel also argues the Administrative Judge erroneously relied on the absence of other Guideline B disqualifying conditions in support of his conclusion that Applicant had overcome the Government's case against him. Department Counsel contends that the Judge impermissibly concluded that Applicant had overcome the doubts as to his security eligibility, in part, because of Applicant did not engage in more serious conduct that was never alleged in the SOR. Department Counsel's argument is persuasive.

In the decision below, the Administrative Judge specifically noted that there is no evidence that certain Foreign Influence disqualifying conditions were applicable to Applicant's case. The Judge's reliance on the absence of such evidence was arbitrary and capricious. The fact that an applicant has not engaged in other conduct that may have serious negative security significance does not justify a conclusion that the applicant's admitted or proven conduct does not have negative security significance. *See* ISCR Case No. 99-0254 (February 16, 2000) at p. 3; ISCR Case No. 98-0476 (December 14, 1999) at p. 4. It is arbitrary and capricious to assess the security significance of an applicant's conduct and circumstances based on an enumeration of what the applicant has not done and concluding the absence of such conduct is somehow extenuating or mitigating. A conclusion that an applicant's case is not as bad as it possibly could be is not a reasonable basis for deciding that it is clearly consistent with the national interest to grant or continue a security clearance for the applicant. Accordingly, the Judge did not have a rational basis for drawing favorable conclusions from the fact that Applicant did not engage in various kinds of conduct that were not alleged in the SOR and not proven by Department Counsel.

Applicant contends the Administrative Judge properly found in his favor under Guideline B. In support of that contention, Applicant argues: he has voluntarily provided the information about his conduct and situation to the government; he has been consistent in his responses to questions asked by the government about his situation; his memories and feelings about FC are merely the ordinary sentiments that immigrants have for the land of their birth; Applicant's wife intends to apply to become a naturalized U.S. citizen as soon as it is legally possible; the facts and circumstances surrounding his wife's relatives do not support the government's security concerns; and he has no obligations to the FC government. Applicant's arguments do not provide a persuasive basis for affirming the Administrative Judge's favorable findings and conclusions under Guideline B.

Applicant's candor with the federal government about his situation is a positive aspect of this case. However, that candor does not preclude the government from considering the security significance of Applicant's conduct and circumstances. *See, e.g.*, ISCR Case No. 99-0462 (May 25, 2000) at p. 5. Record evidence of Applicant's interpretation of his conduct and circumstances is relevant information that has evidentiary value toward evaluating the motivations and reasons for his conduct. But, an applicant's opinion as to the security significance of his or her conduct and circumstances is not dispositive and cannot relieve adjudicators of their responsibility to evaluate the applicant's security eligibility. *See, e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at p. 12. The expressed intention of Applicant's wife to become a naturalized U.S. citizen in the future does render her current status as an FC citizen (or her family ties in FC) irrelevant to a whole person analysis of Applicant's current suitability for access to classified information. The absence of evidence that Applicant has any obligation to the FC government does not have the significance Applicant attributes to it. The absence of evidence that Applicant has any obligation to the FC government does not diminish or eliminate the security significance of his actual conduct and circumstances. The security significance of Applicant's conduct and circumstances is not negated or diminished merely because Applicant is not in a worse situation than he is.

2. <u>Whether the Administrative Judge's conclusions under Guideline C (Foreign Preference) are arbitrary, capricious, or</u>

contrary to law. Department Counsel contends the Administrative Judge's conclusions under Guideline C are arbitrary, capricious, or contrary to law because: (a) the Judge failed to give due consideration to Applicant's possession and use of an FC passport and Applicant's intent to renew his FC passport; (b) the Judge misapplied Foreign Preference Mitigating Condition 4; and (c) the Judge placed undue weight on Foreign Preference Mitigating Condition 1.

(a) Department Counsel argues the Administrative Judge failed to give due consideration to Applicant's possession and use of an FC passport and Applicant's intent to renew his FC passport because: (i) Applicant failed to demonstrate that he obtained and used an FC passport in reliance on a State Department advisory offered into evidence; (ii) there is insufficient evidence to support the Judge's application of Foreign Preference Mitigating Condition 3[(2)] to Applicant's possession and use of an FC passport; (iii) the Judge failed to properly consider Applicant's motivation for obtaining and using an FC passport; and (iv) Applicant failed to present evidence that he obtained and used an FC passport because of legal necessity.

(a)(i) Department Counsel persuasively argues that Applicant did not demonstrate he obtained and used an FC passport in reliance on a State Department advisory offered into evidence (Applicant Exhibit J). The State Department advisory, dated September 14, 1999, cannot factually or logically be deemed relevant to Applicant's decision to obtain an FC passport in 1993 and to use it on trips to FC prior to the issuance of that advisory. Since Applicant was offering the State Department advisory as a kind of affirmative defense to extenuate or mitigate his conduct, Applicant had the burden of demonstrating two things: first, the advisory (or its equivalent) was in existence when he acted to obtain and use an FC passport; and second, Applicant acted in reliance on the State Department advisory when he obtained and used an FC passport. Applicant offered no evidence to support either point. Indeed, at the hearing, Applicant admitted he was not aware of the State Department advisory until "just recently" (Hearing Transcript at p. 111). And on appeal Applicant essentially concedes Department Counsel's argument on this issue by acknowledging he did not know about the State Department advisory when he was preparing to travel to FC.

(a)(ii) Department Counsel also argues that the evidence presented by Applicant did not warrant application of Foreign Preference itigating Condition 3 because that evidence did not demonstrate the federal government affirmatively approved, authorized, consented to, or otherwise sanctioned Applicant's possession and use of an FC passport. As noted in the preceding paragraph, Applicant offered no evidence as to what the State Department's position concerning the possession and use of FC passports was when Applicant made his trips to FC in 1993, 1995, 1997, and 1997-1998. Since Applicant had the burden of proof on this aspect of the case, his failure to present such evidence left no rational basis for the Administrative Judge to apply Foreign Preference itigating Condition 3 in this case.

(a)(iii) and (a)(iv) Department Counsel's third and fourth arguments are interrelated and can be addressed together. It was not arbitrary or capricious for the Administrative Judge to rely on prior Board decisions concerning the possession and use of foreign passports. It is unnecessary for the Board to decide whether the Judge properly applied the reasoning of those Board decisions to this case because the ASDC3I memo has superseded prior Board decisions concerning the possession and use of a foreign passport. *See* ISCR Case No. 99-0457 (January 3, 2001) at p. 5; ISCR Case No. 99-0511 (December 19, 2000) at p. 12; ISCR Case No. 99-0295 (October 20, 2000) at pp. 6-7; ISCR Case No. 99-0454 (October 17, 2000) at p. 5 n.5. As indicated in the cited Board decisions, the Board's prior rulings on legal necessity are no longer viable. Accordingly, the Judge's findings and conclusions that Applicant possessed and used an FC passport out of legal necessity cannot be sustained in light of the ASDC3I memo.

(b) Department Counsel contends the Administrative Judge misapplied Foreign Preference Mitigating Condition 4.[(3)] In support of this contention, Department Counsel argues: (i) Applicant's statements about renouncing his FC citizenship were conditional and the record evidence does not support the Judge's finding that Applicant expressed an unconditional willingness to renounce his FC citizenship; and (ii) the Judge erred by relying on his findings about Applicant's statements concerning renunciation of his FC citizenship to conclude Applicant is not likely to renew his FC passport.

(b)(i) The record evidence as a whole does not support the Administrative Judge's finding that Applicant expressed an unconditional willingness to renounce his FC citizenship. Rather, the record evidence as a whole indicates Applicant has expressed a qualified or conditional willingness to renounce his FC citizenship.[(4)] The Board has held that a conditional willingness to renounce dual citizenship is entitled to less weight than an unconditional willingness to renounce. *See, e.g.*, ISCR Case No. 99-0295 (October 20, 2000) at p. 7. However, the Board has declined to hold that, as a matter of

law, an applicant's conditional willingness to renounce dual citizenship is entitled to no weight. *See, e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at p. 9.

(b)(ii) The Administrative Judge erred by relying on his findings about Applicant's statements about his willingness to renounce his FC citizenship to find Applicant is not likely to renew his FC passport. As discussed in the preceding paragraph, the record evidence does not support the Judge's finding that Applicant expressed an unconditional willingness to renounce his FC citizenship. Furthermore, there is record evidence that Applicant has expressed a reluctance to give up his ability to travel to FC. For example, in response to written interrogatories (Exhibit 3), Applicant indicated a desire to be able to travel to FC in the future and noted that he might have to renew his FC passport to engage in such travel. Furthermore, in Applicant's answer to the SOR, notarized about three months before the hearing, Applicant admitted SOR paragraph 2.g. (which alleged that he intended to renew his FC passport) and specifically stated that he needed the ability to travel to FC in the future if certain situations arose, and that he would renew his FC passport if that were the only way he could travel to FC in the future.[(5)] The Judge placed far too much weight on his erroneous finding that Applicant expressed an unconditional willingness to renounce his FC citizenship and failed to consider Applicant's admissions and record evidence that fairly detracted from a finding that Applicant is not likely to renew his FC passport. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

(c) Department Counsel also contends the Administrative Judge placed undue weight on Foreign Preference Mitigating Condition 1.[(6)] In support of this contention, Department Counsel argues: (i) the Judge did not articulate any explanation for applying Foreign Preference Mitigating Condition 1; (ii) 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 his decision in this case; and (iii) in the alternative, even if the Judge could apply Foreign Preference Mitigating Condition 1, the Judge gave it undue weight.

(c)(i) and (c)(ii) 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 his decision in this case, the Board changed its position concerning the application of Foreign Preference itigating 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 his 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 with respect to applying Foreign Preference Mitigating Condition 1 at the time he issued his 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)(iii) Department Counsel argues, in the alternative, that the Administrative Judge gave undue weight to Foreign Preference itigating Condition 1 because application of that mitigating condition did not relieve the Judge of the obligation to consider Applicant's exercise of dual citizenship after he became a naturalized U.S. citizen and explain why the Judge was applying this mitigating condition. Department Counsel correctly notes that application of Foreign Preference Mitigating Condition 1 does not relieve a Judge from considering the record as a whole to determine the overall security significance of an applicant's conduct and circumstances. Although Department Counsel has demonstrated the Judge committed various errors with respect to other aspects of this case, Department Counsel has failed to persuade the Board that the Judge gave undue weight to Foreign Preference itigating Condition 1.

Applicant contends the Administrative Judge properly found in his favor under Guideline C because: he did not initially realize how seriously the government viewed the possession and use of a foreign passport; his trips to FC and his use of an FC passport occurred before he gained a security clearance; it was common knowledge among dual nationals who traveled to FC that it was dangerous to travel to FC with a U.S. passport; he was not showing any preference toward FC when he used an FC passport to enter and leave FC; he used his FC passport only when he entered and left FC; he renounced his FC citizenship when he became a naturalized U.S. citizen; at the hearing, he restated his willingness to renounce his FC citizenship; he has never voted in FC, has never served in the FC military, and has no financial interests or property in FC that he might want to protect; and he cherishes his freedom in the United States and prefers the United

States. Applicant's arguments do not provide a persuasive basis for affirming the Judge's favorable findings and conclusions under Guideline C.

It is irrelevant that Applicant lacked knowledge about how seriously the DoD views the possession and use of a foreign passport with relation to a person's security eligibility. The government is entitled to assess the security significance of an applicant's conduct and circumstances even if the applicant has no idea whether his or her conduct and circumstances raise security concerns.

Security clearance decisions are predictive judgments about an applicant's security eligibility in light of the applicant's past conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988). In making a security clearance decision, the government is not limited to considering only an applicant's conduct after he or she receives a security clearance. Accordingly, the security significance of Applicant's acts of getting and using an FC passport to travel to FC are not diminished merely because they occurred before he got a security clearance.

There is no record evidence whether it was, as Applicant claims on appeal, common knowledge among dual nationals who traveled to FC that it was dangerous to travel to FC with a U.S. passport. And, even if the Board were to assume solely for purposes of deciding this appeal that there were such evidence, it would not warrant a favorable security clearance decision in this case. Applicant voluntarily traveled to FC in 1993, 1995, 1997 and 1997-1998 notwithstanding the following facts shown by the record evidence: Applicant's father went into hiding for two years before fleeing FC after the then-FC government fell; Applicant's immediate family fled FC and had their property seized by the FC government; Applicant's immediate family expressed concern to Applicant about him going to FC; officials of the FC government contacted Applicant during his 1993 trip and sought information about the whereabouts of his father; before taking the 1993 and 1995 trips to FC, Applicant was concerned that he might be drafted into the FC military if he traveled to FC; and Applicant has expressed strong dislike for the FC government and indicated a concern that the FC government might learn of his dislike, to his detriment and the detriment of his relatives in FC. Despite those considerations, Applicant voluntarily chose to travel to FC in 1993, 1995, 1997, and 1997-1998. Considering the totality of the record evidence, Applicant's voluntary decisions to travel to FC on several occasions over the past few years raise serious questions as to whether Applicant is a suitable person to be granted a security clearance because of the risks he knowingly took each time he traveled to FC. *See* Directive, Item E2.2.4 ("Although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior.")

Applicant's denial of any preference for FC is relevant information that could be considered by the Administrative Judge. However, Applicant's denial of any preference for FC is not dispositive and has to be considered in light of the record evidence as a whole.

Applicant also notes he renounced his FC citizenship when he became a naturalized U.S. citizen. As discussed earlier in this decision, the weight that the Administrative Judge could give to that fact is tempered by the record evidence that Applicant voluntarily exercised the rights and privileges of FC citizenship after he became a naturalized U.S. citizen.

Applicant further notes he has never voted in FC, has never served in the FC military, and has no financial interests or property in FC that he might want to protect. As discussed earlier in this decision, the fact that an applicant has not engaged in other conduct that may have serious negative security significance does not justify a conclusion that the applicant's admitted or proven conduct does not have negative security significance.

Finally, Applicant states that he cherishes his freedom in the United States. Applicant's appreciation of his freedom in the United States does not preclude the federal government from considering whether the totality of Applicant's conduct and circumstances preclude an affirmative finding that it is clearly consistent with the national interest to grant or continue a security clearance for him.

Conclusion

Department Counsel has met its burden of demonstrating error below that warrants reversal. Pursuant to Item E3.1.33.3. of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's favorable security

clearance 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. Department Counsel does not have the burden of proving that an Adjudicative Guideline mitigating condition is not applicable. Under Item E3.1.15 of the Additional Procedural Guidance, the applicant bears the burden of proving that such a mitigating condition is applicable. *See, e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at pp. 7 n.2 and 10; ISCR Case No. 99-0597 (December 13, 2000) at p. 7.

2. "Activity is sanctioned by the United States."

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

4. When Applicant became a naturalized U.S. citizen he was required by federal law to take the oath of allegiance, in which he foreswore allegiance to any other country. The weight that the Administrative Judge could give to Applicant's taking the oath of allegiance had to be tempered by the record evidence that Applicant voluntarily exercised the rights and privileges of an FC citizen after he became a naturalized U.S. citizen. The record evidence in this case shows that Applicant's trips to FC in 1993, 1995, 1997, and 1997-1998 were undertaken as a matter of voluntary choice by Applicant for personal reasons.

5. At the hearing, Department Counsel moved to amend the SOR to strike SOR paragraph 2.f. and renumber paragraph 2.g. as paragraph 2.f. That amendment did not affect the substance of SOR paragraph 2.g. or Applicant's response to it in his answer to the SOR.

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