DATE: February 27, 2001

In Re:

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

Applicant for Security Clearance

ISCR Case No. 99-0532

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Martin H. Mogul, Esq., Department Counsel

FOR APPLICANT

Lawrence E. Lindeman, Esq.

Administrative Judge Wilford H. Ross 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 a memorandum by the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence is applicable to Applicant's case; (2) whether the Administrative Judge's conclusions under Guideline C (Foreign Preference) are arbitrary, capricious, or contrary to law; (3) whether the Administrative Judge's conclusions under Guideline B (Foreign Influence) are arbitrary, capricious, or contrary to law; and (4) whether the Administrative Judge erred by making a determination as to Applicant's loyalty in violation of Executive Order 10865, Section 7.

Procedural History

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

Applicant submitted an answer to the SOR in which he indicated "I do not request a hearing." A File of Relevant Material (FORM) was prepared, and a copy of the FORM was given to Applicant. Applicant submitted a response to the FORM and the case was then assigned to the Administrative Judge for consideration.

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.

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 a foreign country (FC) in 1958. In 1978, Applicant emigrated to the United States. In 1992, Applicant became a naturalized U.S. citizen.

Applicant's mother, father, and sister live in FC. Applicant's contacts with his parents and sister are casual and infrequent. Applicant states none of his family members in FC are agents of FC and none hold government positions in FC.

Applicant visited his family in FC in 1990, before he became a naturalized U.S. citizen.

In 1993, Applicant decided to visit his parents and sister in FC. In accordance with FC law, Applicant sent his passport to the FC interests section in the United States to obtain a visa. Applicant was informed by the FC interests section that he was still considered to be a citizen of FC and could travel there only with an FC passport. This is in accord with information found in a U.S. State Department Consular Information Sheet, dated September 14, 1999. Applicant subsequently obtained an FC passport, which he used to visit his family in FC in 1993. Applicant's FC passport expired in 1996.

Administrative Judge's Conclusions

Applicant's 1990 trip to FC does not have current security significance because it occurred before he became a naturalized U.S. citizen.

Applicant's contacts with his parents and sister in FC are casual and infrequent. The record is insufficient to find that Applicant's parents are, or are not, in a position to be exploited by a foreign power. However, that is of no moment because of the paucity of Applicant's contacts with his parents. Furthermore, Applicant's wife and children are U.S. citizens, he has lived the majority of his life in the United States, he has received all his advanced education in the United States, and he has been employed in the United States since 1985. Under the particular circumstances of this case, Applicant's family ties show he has successfully overcome any allegations of foreign influence.

Applicant is a naturalized U.S. citizen. FC views Applicant as an FC citizen by birth and has no mechanism for him to revoke FC citizenship. Applicant does not view himself as a dual citizen and considers himself to be only a U.S. citizen. Applicant's statements about the United States convey a more accurate view of his feelings than statements he made in Government Exhibit 5. Applicant is a loyal American.

Applicant's use of an FC passport in 1993 is insufficient to show a preference for FC. Applicant did not apply for that passport, but was given it in lieu of a visa to FC. The U.S. State Department acknowledges that FC requires its dual citizens to use FC passports to enter and leave FC. The U.S. Government has sanctioned U.S. citizens to use FC

passports to enter and leave FC. Applicant has no intention of renewing the FC passport that expired in 1996.

Applicant's possession and use of an FC passport is clearly of security significance. However, given the totality of the record evidence in this case, Applicant's reluctant one-time possession and use of an FC passport cannot fairly by characterized as an expression of a foreign preference.

It is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Appeal Issues

1. Whether a memorandum by the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence is applicable to Applicant's case. As discussed in the Procedural History portion of this decision, the ASDC3I issued a memo. That memo addresses DoD policy concerning the possession and use of a foreign passport.

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.

Applicant contends he has satisfied the terms of the ASDC3I memo because his FC passport expired in 1996 and he has made no attempt to have it renewed or reissued. Department Counsel contends the ASDC3I memo applies to this case, but states "[b]ecause there is some record evidence which could support a claim by Applicant that he 'surrendered' his foreign passport prior to the hearing, the [ASDC3I] memorandum is not dispositive in this case." Department Counsel argues that surrender of a foreign passport does not, standing alone, mandate the granting of a security clearance.

Because Department Counsel is not relying on the ASDC3I memo as a basis for urging reversal of the Administrative Judge's favorable security clearance decision, the Board need not decide whether expiration of a foreign passport would satisfy the terms of the ASDC3I memo. Even if the Board were to assume solely for the sake of deciding this appeal that expiration of Applicant's FC passport fell within the terms of the ASDC3I memo, it would not be extenuating or mitigating under the particular facts of this case.

2. Whether the Administrative Judge's conclusions under Guideline C (Foreign Preference) are arbitrary, capricious, or contrary to law. Department Counsel contends: (a) the Administrative Judge erred by applying Foreign Preference Mitigating Condition 1, or in the alternative, the Judge gave undue weight to it under the particular facts of this case; and (b) the Judge erred by applying Foreign Preference Mitigating Condition 3.

(a) Foreign Preference Mitigating Condition 1.[(1)] 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 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 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. *See* ISCR Case No. 99-0601 (January 30, 2001) at pp. 11-12; ISCR Case

No. 99-0597 (December 13, 2000) at p. 8.

Department Counsel contends, in the alternative, that the Administrative Judge gave undue weight to Foreign Preference itigating Condition 1. In support of this contention, Department Counsel argues: (i) application of Foreign Preference itigating Condition 1 does not explain why the Judge concluded Applicant's obtaining an FC passport in 1993 has no security significance; (ii) the Judge erred by ignoring Applicant's admission that he was keeping his FC citizenship to be able to get an FC passport to see his parents in FC; and (iii) the Judge improperly applied Foreign Influence Mitigating Condition 3 to bolster the weight he was giving to Foreign Preference Mitigating Condition 1. Applicant contends Department Counsel's contention lacks merit because the Judge did not conclude that there was no security significance to Applicant's conduct in obtaining an FC passport in 1993, and the Judge did not give much weight to Foreign Preference Mitigating Condition 1.

Department Counsel correctly notes that application of Foreign Preference Mitigating Condition 1 would not relieve the Administrative Judge of the obligation to consider the record as a whole to determine the overall security significance of Applicant's conduct and circumstances. However, Department Counsel falls short of persuading the Board that the Judge gave undue weight to Foreign Preference Mitigating Condition 1 in this case.

Department Counsel's argument concerning the Administrative Judge's reliance on Foreign Influence Mitigating Condition 3 [(2)] has mixed merit. 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, this case involves an evaluation of the security significance of Applicant's conduct and circumstances under Guideline B (Foreign Influence) and Guideline C (Foreign Preference), which have a close relationship, and there are factual and logical connections between Applicant's conduct and circumstances under Guideline B and Guideline C. Accordingly, it was not arbitrary and capricious for the Judge to consider Applicant's conduct and circumstances under both Guideline B and Guideline C. *See, e.g.*, ISCR Case No. 99-0601 (January 30, 2001) at pp. 6-7. However, the Judge erred by applying Foreign Influence Mitigating Condition 3 to Applicant's trips to FC. [(3)] Applicant's trips to FC could be considered as infrequent, but they were not casual with respect to Applicant's contacts with his family members in FC. Accordingly, the Judge erred by applying Foreign Influence Mitigating Condition 3 to Applicant's trips to FC.

(b) Foreign Preference Mitigating Condition 3. [(4)] Department Counsel contends the Administrative Judge erred by applying Foreign Preference Mitigating Condition 3 because the record evidence does not show that the federal government affirmatively approved, authorized, consented to, or otherwise sanctioned Applicant's possession and use of an FC passport. Applicant argues that U.S. State Department policy on the use of foreign passports is sufficient to justify the Judge's application of Foreign Preference Mitigating Condition 3, and that he used an FC passport out of legal necessity.

The State Department advisory relied on by Applicant cannot factually or logically be deemed relevant to Applicant's possession and use of an FC passport in 1993, several years prior to the date 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 possessed and used an FC passport; and second, Applicant acted in reliance on the State Department advisory when he possessed and used an FC passport. *See* ISCR Case No. 99-0424 (February 8, 2001) at p. 15; ISCR Case No. 99-0601 (January 30, 2001) at pp. 9-10. Applicant offered no evidence to support either point. Applicant had the burden of presenting evidence supporting application of extenuation or mitigation of his possession and use of an FC passport. *See, e.g.*, ISCR Case No. 99-0601 (January 30, 2001) at p. 7. 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 Judge to apply Foreign Preference Mitigating Condition 3 in this case.

Applicant correctly notes the Board has issued decisions indicating that possession and use of a foreign passport can be extenuating or mitigating. However, the ASDC3I memo has superseded prior Board decisions concerning the possession and use of a foreign passport. *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; 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, Applicant's legal necessity argument does not provide a basis upon which the Board can affirm the Judge's decision.

3. Whether the Administrative Judge's conclusions under Guideline B (Foreign Influence) are arbitrary, capricious, or contrary to law. In concluding Applicant had overcome the allegations of foreign influence, the Administrative Judge stated "The record is insufficient for me to find that [Applicant's] parents are, or are not, in a position to be exploited by a foreign power. However, given the paucity of the Applicant's contacts with them, that is of no moment. I have also considered the fact that Applicant's wife is an American citizen, as are his children, that he has lived here the majority of his life, received all his advanced education in the United States. and has been employed in the United States in 1985." Department Counsel challenges the Administrative Judge's conclusions under Guideline B. In support of this contention, Department Counsel argues: (a) the Judge imposed an improper burden of proof on Department Counsel; (b) it is Applicant's burden of proof to eliminate doubts raised by his family ties in FC; and (c) the Judge erred by applying Foreign Influence Mitigating Condition 3 because Applicant's ties to his parents in FC are not casual. In response, Applicant argues: (d) the Judge properly stated and applied the burdens of proof in this case; (e) the Judge properly applied Foreign Influence Mitigating Condition 3; (f) it is inconceivable that Applicant would risk destroying his life in the United States; and (g) there is no evidence rebutting Applicant's statement that he would immediately contact his security office, DoD or the FBI if anyone tried to coerce, influence, or pressure him or his family.

The Administrative Judge erred by applying Foreign Influence Mitigating Condition 3. As discussed earlier in this decision, Applicant's trips to FC were infrequent, but they were not casual.

The Administrative Judge did not fail to correctly state the burdens of proof carried by Department Counsel and Applicant respectively. However, the Judge's analysis under Guideline B had the practical effect of relieving Applicant of his burden of proving extenuation or mitigation of his family ties in FC. Applicant's family ties in FC raise a *prima facie* security concern sufficient to require him to present evidence of rebuttal, extenuation or mitigation sufficient to meet his burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for him. *See* ISCR Case No. 99-0424 (February 8, 2001) at pp. 11-12. When the Judge concluded he could not determine that Applicant's family members in FC were not in a position to be exploited by a foreign power, the Judge identified a doubt about Applicant's suitability for access to classified information. However, the Judge failed to articulate a rational basis for dismissing the dilemma posed by that conclusion. The low number of Applicant's trips to FC did not provide a rational basis for the Judge to summarily dismiss the negative security implications of the lack of record evidence to allow the Judge to conclude Applicant's family in FC were not in a position to be exploited. Furthermore, since the Judge's conclusions about the nature and strength of Applicant's life and ties in the United States were not sufficient to support an affirmative determination that Applicant's family members in FC are not in a position to be exploited by as foreign power, the Judge was left with an unresolved doubt under Guideline B that should have been resolved in favor of the national security, not in favor of Applicant. *See* Directive, Item E2.2.2.

The Board is not persuaded by Applicant's argument concerning his statement (in the record below) about contacting appropriate authorities if anyone tried to coerce, influence, or pressure him or his family. First, the unrebutted nature of Applicant's statement is not dispositive. A person's statements need not be accepted at face value merely because they are unrebutted. *See, e.g.*, ISCR Case No. 99-0005 (April 19, 2000) at p. 3. Second, Applicant's statement is not entitled to the weight Applicant places on it. Applicant's statement reflects a proper and commendable position. However, the federal government need not wait until Applicant is actually approached or contacted by any FC person or organization and see how he acts in response to such an approach before it can decide whether to deny or revoke his access to classified information in light of all the facts and circumstances of his conduct and circumstances. *See* ISCR Case No. 99-0480 (November 28, 2000) at p. 6. Furthermore, statements by an applicant about what he or she will do in the future in response to any attempt to exploit his or her family ties, however sincere or credible, cannot be taken simply at face value. An applicant's stated intention about what he or she might do in the future under some hypothetical set of circumstances is merely a statement of intention that is not entitled to much weight, unless there is record evidence that the applicant has acted in an identical or similar manner in the past under identical or similar circumstances. As a matter of common sense, a person's stated intention to engage in future conduct that is identical or similar to the person's past conduct is entitled to be given more weight than a person's stated intention to engage in future conduct of a kind that the person never has engaged in before. *See* ISCR Case No. 99-0501 (December 19, 2000) at p. 11.

Independent of Applicant's arguments that respond to Department Counsel's arguments concerning Guideline B (Foreign Influence), Applicant: (a) points out that he has no financial interests in FC; and (b) asserts he has never divulged information about his employment, his place of employment or his access to classified information to his family members in FC or anyone else in FC. The fact that Applicant has not engaged in other conduct that may have negative security significance does not compel a conclusion that Applicant's actual conduct and circumstances do not have negative security significance. A favorable security clearance decision is not mandated merely because an applicant's conduct is not as serious as it possibly could be. *See, e.g.*, ISCR Case No. 99-0601 (January 30, 2001) at p. 8.

4. Whether the Administrative Judge erred by making a determination as to Applicant's loyalty in violation of Executive Order 10865, Section 7. Department Counsel contends the Administrative Judge improperly injected Applicant's loyalty into his decision in violation of Executive Order 10865, Section 7. Applicant argues that Department Counsel is "sandbagging" him by raising this claim of error because DOHA injected Applicant's loyalty into the proceeding with its interrogatories to Applicant (Government Exhibit 6). Applicant argues, in the alternative, that: (a) the Judge did not pass judgment on Applicant's loyalty, but only referred to the information Applicant provided to DOHA in response to written interrogatories; and (b) even if the Judge erred on this point, it is largely tangential to his ultimate findings and conclusions and, therefore, it is nothing more than harmless error.

Applicant is correct in noting that the issue of Applicant's loyalty was raised by the written interrogatories sent to Applicant by DOHA. Furthermore, Applicant's objection to Department Counsel's position on this issue is not frivolous. Normally, it would be unfair for a party to "open the door" on a matter during the proceedings below and then complain on appeal that an Administrative Judge addressed that matter in making a security clearance decision. However, the prohibition of Executive Order 10865, Section 7 does not pertain to a procedural or evidentiary right that might be deemed waived by a party's mistake in "opening the door" to a subject matter that should not have been allowed to be raised in the proceedings below. Mistakes by the parties cannot confer authority on a Judge to consider an applicant's loyalty in making decisions under Executive Order 10865. *See* ISCR Case No. 99-0452 (March 21, 2000) at pp. 5-6.

Applicant persuasively argues that the Administrative Judge's error on this matter is, at most, harmless when viewed in light of the Judge's decision as a whole.

Conclusion

Department Counsel has met its burden of demonstrating error that warrants reversal. Pursuant to Item E3.1.33.3 of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's March 17, 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. "Dual citizenship is based solely on parents' citizenship or birth in a foreign country."

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

3. Applicant's 1990 trip to FC occurred before Applicant became a naturalized U.S. citizen. Although the 1990 trip did not involve any conduct that constituted the exercise of dual citizenship by Applicant, the Administrative Judge erred by summarily dismissing it in his analysis of Applicant's case. *See* ISCR Case No. 99-0511 (December 19, 2000) at pp. 7-8 (discussing how conduct that occurred before an applicant became a naturalized U.S. citizen can be relevant to assessing the applicant's conduct and circumstances after the applicant became a naturalized U.S. citizen).

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