DATE: March 17, 2000

In Re:

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

Applicant for Security Clearance

ISCR Case No. 99-0601

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Matthew Malone, Department Counsel

FOR APPLICANT

Allen M. Kerpan, Esquire

STATEMENT OF THE CASE

On November 9, 1999, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended by Change 4, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

On November 23, 1999, Applicant responded to the allegations set forth in the SOR, and elected to have a hearing before a DOHA Administrative Judge. The case was assigned to me for resolution on December 22, 1999, after being transferred from another Administrative Judge. On January 9, 2000, a Notice of Hearing was issued, setting the matter for January 19, 2000. In the interim, Applicant obtained an attorney, who requested a short continuance. As a result of Applicant's being called to active duty for a short period, the matter was postponed a second time and finally was set for February 23, 2000, on which date the hearing was conducted.

At the hearing, the Government did not call any witnesses, but offered five exhibits. These exhibits were marked for identification as Government's Exhibits (GX) 1 - 5. Applicant testified on his own behalf and called four other witnesses, all work-related. He offered 10 exhibits, which were marked for identification (Applicant's Exhibits (AX) A-J). Applicant did not object to any of the Government's exhibits and all five Government exhibits were admitted as evidence. Department Counsel did object to one proposed Applicant Exhibit, AX C, which related to the qualifications of a proposed "Expert Witness," Mr. A. After hearing argument about the eligibility of Mr. A to testify as an expert, I denied the request and therefore found the AX C to be moot. AX C was therefore not admitted into evidence, but has been kept in the case file under "Rejected Exhibits." The other Applicant's Exhibits, A, B, and D - F, were admitted into evidence.

The transcript was received at DOHA on March 14, 2000.

ADMINISTRATIVE MATTERS

This is a case where the Applicant had been granted a security clearance on June 28, 1998, based on the same underlying facts and circumstances. Applicant's case was thereafter affected by a change in DoD policy, whereby favorable adjudications were to be revisited and reevaluated where individuals with dual citizenship had used a passport from another country.

DOHA sent Applicant two sets of Interrogatories (GX 4 and 5), to which he responded. The SOR subsequently issued on November 9, 1999 reflects a new evaluation of all of the evidence obtained in this matter, including the Interrogatories.

At the hearing, Applicant's Counsel raised the issue of the propriety of this change in position by DOHA, which led to the issuance of the November 9, 1999 SOR, and specifically cited the language of NISPOM 2-203 (AX A). After arguments from both sides, I concluded that a DOHA Operating Instruction clarifies that the NISPOM provision applies only to matters involving separate agencies, but that DoD always retains the authority to revisit its own earlier decisions granting a clearance.

I also considered a request by Counsel for Applicant to qualify a proposed witness, Mr. A, as an expert in security clearance matters, so that he could testify that it was clearly consistent with the national interest for Applicant to have a clearance. After argument, I ruled that the testimony Counsel for Applicant was seeking to obtain from Mr. A was not a subject requiring expertise to establish or help establish, but a matter for this Administrative Judge to decide and only after hearing all of the evidence and applying the relevant standards. I did agree that Mr. A could properly testify as a non-expert witness, as to his knowledge of Applicant's conduct and character and whether he believed Applicant could be trusted with classified material (Transcript (Tr) at 21).

FINDINGS OF FACT

After a thorough review and analysis of Applicant's response to the SOR, in which he "admits" (with explanations) all the SOR allegations; all the hearing testimony and exhibits from both parties; and closing arguments by both parties as to how the record evidence should be viewed, I make the following findings of fact:

GUIDELINE B (FOREIGN INFLUENCE)

SOR 1.a. - Applicant's father-in-law, mother-in-law, two brothers-in-law, and a sister-in-law, live in FC, a Middle Eastern Country, and are citizens of FC. His in-laws have a private business in FC but have never been politically active or involved with the FC government in any way (Tr at 120). The in-laws believe in living "low-key," to avoid "being picked on by the government" (Id.). On the question of possible pressure being put on Applicant because of his in-laws, Applicant was emphatic that he would immediately contact U.S. authorities and not do anything improper or illegal

(Tr at 121).

SOR 1.b. -In 1993, while visiting in FC, Applicant was contacted at the airport by men who described themselves as "agents" of the FC government. They asked Applicant about the current location of his father and other relatives, his activities in the United States (US), and any relationship with a FC dissident group in the US. Applicant refused to cooperate with them and has never been contacted again.

SOR 1.c. - In the early to mid 1990s, Applicant was contacted by a man in the US who asked him if he were willing to help the FC people. Applicant believed that the man was a representative of the same dissident group cited in SOR 1.b., which continues to be in opposition to the present FC government. Applicant told the person he was not interested in what he was being told and was never contacted again. The incidents described in SOR 1.b. and 1.c. are the only times in Applicant's more than 20 years of living in the US that he was contacted by either a pro or anti-FC individual or group. Applicant voluntarily mentioned both incidents to the DSS agent even though it was "so insignificant" because he "wanted to be thorough and complete" (Tr at 121, 122). In neither incident was Applicant asked to do anything at all, let alone violate any U.S. interests (Tr at 127).

SOR 1.d. - Applicant's wife is a FC citizen. After being unable to find a suitable wife in the U.S., Applicant decided to find someone with a similar background, in FC. He tried first by long distance and then traveled to FC. "After several trips, [he] was finally able to find someone" and brought her to the United States in 1998. (Response to SOR). Applicant's wife has been in the United States for a little more than two years will be eligible to apply for U.S. citizenship in another year and intends to do so (Tr at 138).

GUIDELINE C (FOREIGN PREFERENCE)

SOR 2.a. - Applicant exercises dual citizenship of both FC and the United States. He is a citizen of FC by reason of his birth there (Response to SOR 2.a.). The "exercise" of his FC citizenship consists only of obtaining and using a FC passport to enter and leave FC. He does so not out of any preference for FC, or as a matter of convenience, but because he fears the consequences if FC authorities saw a U.S. passport in the hands of someone they considered to be a citizen of FC. He fears that, at the least, they would seize the U.S. passport. Applicant believes that keeping a low profile in FC is required if he is to avoid problems with FC authorities, who have a history of poor relations with the U.S. Applicant testified that his wife's parents and family in FC also keep a low profile to avoid problems with the government and Applicant he did not want to jeopardize their position and security in that country. The in-laws have lived in FC "all their lives" and they've never had any problems (Tr at 125).

SOR 2.b. - Applicant obtained a passport from the Government of FC in April 1993, which was after he had become a naturalized U.S. citizen but years before he accepted a job with his present employer and sought a security clearance (Tr at 11). The FC passport was extended through April 27, 1999. It expired on that date and has not been renewed (GX 4). Applicant obtained a FC passport after being in the United States for fifteen years because "it would have been almost impossible to go to [FC] without an FC passport"and would make him "a target" (Tr at 109). His "only reason for having the [FC] passport was enter and exit [FC] was to avoid problems and possible danger" (Tr at 110) and not to identify with FC or to show a preference for FC over the U.S. (Tr at 110, 111). He had become aware of the warning on the U.S. State Department Web Site about dual U.S. - FC nationals traveling to FC using their U.S. passport (Tr at 111, 112). Since he had relatives in FC, he concluded he should obtain and use the FC passport to visit hat country, not out of preference or convenience but out of necessity based on a reasonable fear of danger if he did not do so (Tr at 112).

When he interviewed with his present employer, he did inform his prospective superiors (Mr. B and Mr. C) of his plans to go to FC to seek a wife (Response to SOR and Tr at 108,109). He was not aware that he was also supposed to have reported that fact to the Facility Security Officer who subsequently submitted an Adverse Information report (AIR) to DSS (Tr at 75, 76). Apparently, neither were Mr. B nor Mr. C (Tr at 64, 73, 86). I draw no adverse conclusions from this evidence.

SOR 2.c. - Applicant contacted the FC Interest Section at a third country's Embassy in the U.S. in approximately 1993, to ascertain whether FC still considered him to be subject to FC military service and, if so, obtain an exemption on his FC passport which would allow him to travel to FC without being drafted. Applicant did so, not out of any preference for FC, but because he feared he would be drafted if he did return to FC for a visit and wanted official assurances that this would not happen. The information in the SOR about this contact, and that described in SOR 2.d., came directly from Applicant. In his hearing testimony, Applicant explained further that he "just wanted to make sure" any military service requirements claimed by FC would not result in his detention in FC (Tr at 140).

SOR 2.d. - Applicant contacted the FC Interest Section at a fourth county's Embassy in the U.S. in approximately 1995 to obtain verification that he was no longer subject to the military draft in FC due to his age. This was a follow up to his 1993 contact, intended to verify that he had no military service obligation before he went to FC (Tr at 140). As with SOR 2.c., I conclude Applicant acted not out of any preference for FC, but because he wanted to verify that he would not be drafted if he returned to FC for a visit and prevented from returning to the US and his family.

SOR 2.e. - Applicant traveled to FC sometime in May of June 1993, again in September or October 1995, again in May or June 1997, and from December 12, 1997 to January 4, 1998. On each occasion, he used his FC passport to enter and leave FC, in lieu of using his U.S. passport. He could have used his U.S. passport, but only at "great risk" (Tr at 124). His most recent use of the FC passport was to return to that country for the purposes of arranging his marriage to his present wife, which occurred in FC on January 3, 1998 (GX 2). He has not been in FC since that time. His wife is now

expecting their first child who, under U.S. law, will be a U.S. citizen by right of birth in this country. He has used his U.S. passport for all other purposes, including traveling to another iddle East country to facilitate his entry into FC when he went to meet his future wife (Tr at 122).

SOR 2.f. - alleges that Applicant may renew his FC passport in order to travel to FC in the future. This was accurate at the time of his response to the second interrogatory (GX 5), which was the basis for this SOR allegation, but is no longer the case, particularly since he is willing to renounce his FC citizenship.

I also make the following findings of fact:

Applicant was born in FC in 1959 and moved to the United States in 1977 to continue his education. That was two years before the current regime in FC came to power through a revolution.

His father had been a local police chief in one of the major cities in FC prior to the revolution, but had to go into hiding with Applicant's younger sister for two years before being able to escape to a bordering country, where the U.S. Embassy assisted them in getting to the U.S., where they all now live (Tr at 128 - 132). Before Applicant's mother, brother, and two sisters were able to flee FC, the new government had seized all their assets. All of Applicant's immediate family members are now naturalized U.S. citizens, except for his wife, who is awaiting the requisite time period before filing her petition for U.S. citizenship.

Applicant has some feelings for the country of his birth but avers that he "would never betray the trust given to me by [his] adopted country." Based on this history, I am compelled to accept Applicant's claim that "my family and myself would be the last people that would have any kind of sympathy for the current regime in FC" (GX 4).

Applicant has expressed, in no uncertain terms, that neither he nor his family has any "intention of going back" (Id.). As of 1999, when he completed the sworn statement (GX 4), the only reason he had kept his FC "citizenship and passport is so I can travel to [FC] if I have to." He believes it "is almost impossible to go to FC as an American (GX 4), but if it becomes absolutely necessary for me to hold my clearance and continue with my current employment, I am willing to renounce my [FC] citizenship" (GX 4). At the hearing, Applicant "expressed a willingness to give up his [FC] citizenship," in conformance with Mitigating Condition (4). Specifically, when asked: "Are you willing, at this juncture and at his time and place in this courtroom, to renounce your [FC] citizenship," Applicant answered "Yes" (Tr at 117).

Applicant has actually researched the issue of his dual citizenship, including contacting FC authorities. It is his understanding that FC does not recognize dual nationality and still recognizes Applicant as only a FC citizen, presumably because of his birth in that country. FC does not recognize Applicant as an American citizen (Tr at 119). He has contemplated sending FC authorities a letter stating his intent to renounce FC citizenship but is concerned that such action would only draw attention to him and accomplish nothing more than placing him on a list of people to be closely looked at (Id.).

Applicant has no present plans to return to FC, but "when the situation is more stable, my wife and I would like to go back to [FC] to visit my wife's family and my own relatives" (GX 5).

Applicant explained his calling himself a U.S. citizen on his Security Clearance Application (SCA) (GX 1), i.e., no mention of FC, because he didn't "think of [himself] being a citizen of [FC] because of what my family went through because of the government in [FC]" (GX 3).

Applicant has some cultural ties to FC but his U.S. citizenship is most important to him. The fact that his expected child will be an American is also very important to him (Tr at 114). His explanation is persuasive:

You have to understand the situation in [FC] and the kind of government and the limitations that are put on the citizens. And, basically, there are no rights. I mean as far as being able to talk. Say you're taught "do what you like." It's a dictatorship, basically, and one of the worse ones. And the only thing is the clergy are at the top this time, at the head of the government.

(Tr at 114)

Applicant's appreciation for the freedoms he has found in this country is manifest in his words and by the demeanor I observed at the hearing. I found him to be a candid and highly credible witness. Applicant called four witnesses, in addition to himself. One was Mr. A, cited above. The other three witnesses, also line supervisors of Applicant, were Mr. B, Mr. C., and Mr. D, respectively, in the order of their testifying. All four have known Applicant since he joined the company 27 months ago, work with him on a frequent and close basis, have seen or heard of no problems with Applicant involving classified materials or information, and consider him to be a man of integrity who has expressed a strong preference and concern for the United States over FC.

POLICIES

The adjudication process established by DoD Directive 5220.6 is based on the "whole person" concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk.

The Government opposes the Applicant's request for a security clearance, based on the nine allegations set forth in the attached SOR, specifically four allegations under Criterion B (Foreign Influence) (SOR 1.a. - 1.d.) and five allegations under Criterion C (Foreign Preference) (SOR 2.a.

- 2.g.).[(1)] In evaluating the evidence, I analyzed all of the evidence under the general guidelines found in Section 6. Procedures, at Section 6.3., including as appropriate:

6.3.1. Nature and seriousness of the conduct and surrounding circumstances.

6.3.2. Frequency and recency of the conduct.

6.3.3. Age of the applicant.

6.3.4. Motivation of the applicant, and the extent to which the conduct was negligent, willful. voluntary, or undertaken with knowledge of the consequences involved.

6.3.5. Absence or presence of rehabilitation.

6.3.6. Probability that the circumstances or conduct will continue or recur in the future.

A restatement of the general guidelines appears at Section E2.2. Adjudicative Process, which explains the "whole person"concept on which the adjudicative process is based.[(2)]

E2.2.1.1. The nature, extent, and seriousness of the conduct.

E2.2.1.2. The circumstances surrounding the conduct, to include knowing participation.

E2.2.1.3. The frequency and recency of the conduct.

E2.2.1.4. The individual's age and maturity at the time of the conduct.

E2.2.1.5. The voluntariness of participation.

E2.2.1.6. The presence or absence of rehabilitation and other pertinent behavioral changes.

E2.2.1.7. The motivation for the conduct.

E2.2.1.8. The potential for pressure, coercion, exploitation, or duress, and

E2.2.1.9. The likelihood of continuation or recurrence.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above exhaust the realm of human experience or that the factors apply equally in every case. Moreover, 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.

Enclosure 2 to the Directive, as amended by Change 4, sets forth specific adjudicative guidelines that must be carefully considered according to the pertinent criterion in making the required overall common sense determination. Considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to this case:

FOREIGN PREFERENCE (CRITERION C)

The preface to this criterion states that: "When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States."

Conditions that could raise a security concern and may be disqualifying include:

E.2.A3.1.2.1. The exercise of dual citizenship;

E.2.A.3.1.2.2. Possession and/or use of a foreign passport;

None of the other possible Disqualifying Conditions (DC) apply under the facts of this case.

Conditions that could mitigate security concerns include:

E.2.A.3.1.3.1. Dual citizenship is based solely on parents' citizenship or birth in a foreign country.

E.2.A.3.1.3.4. Individual has expressed a willingness to renounce dual citizenship.

None of the other possible Mitigating Conditions (MC) apply under the facts of this case.

FOREIGN INFLUENCE (GUIDELINE B)

The preface to this guideline states that a "security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation, *are not* citizens of the United States *or may* be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of foreign countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure."

Conditions that could raise a security concern and may be disqualifying include:

E2.A2.1.2.1. An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in a foreign country.

E2.A2.1.2.2. Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence exists.

None of the other possible disqualifying conditions apply under the facts of this case.

Conditions that could mitigate security concerns:

E.2.A.2.1.3.1. A determination that the immediate family members(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.

E.2.A.2.1.3.3. Contact and correspondence with foreign citizens are casual and infrequent;

The other three Mitigating Conditions do not apply under the facts of this case.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination required by the Directive, the Administrative Judge is not permitted to speculate, but can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for a security clearance may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability on the part of an Applicant. These concerns include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

An Applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the Applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by an Applicant's admissions or by other evidence) and establishes conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. When the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate he or she is nonetheless security worthy. As noted by the U.S. Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates security clearance determinations should err, if they must, on the side of denials." As I understand the Court's rationale, doubts are to be resolved in favor of the Government.

CONCLUSIONS

In reaching my ultimate decision as to Applicant's eligibility to hold a security clearance, I have considered the following points: (1) whether the evidence supports each and every SOR allegation; (2) whether the evidence comes within one or more of the Foreign Preference and Foreign Influence guidelines in the Directive at Enclosure 2; (3) whether the evidence establishes a nexus or connection with Applicant's security clearance eligibility; and (4) whether Applicant has established mitigation and/or extenuation as to any or all of the allegations.

FOREIGN INFLUENCE (CRITERION B)

Under Guideline B, denial or revocation of a clearance can appropriately be based on the existence of relationships, rather than conduct, but the fact of the relationship should be considered with all available evidence bearing on the nature and circumstances of relationship. The vital question is whether the relationships raise a risk that improper influence might be exerted and that an Applicant might respond to the influence by acting contrary to the interests of the United States. It is the identity, position, and circumstances of the other person and the nature and scope of the relationship that is most important in determining whether the relationship will affect the suitability of an Applicant for access to the nation's secrets.

SOR 1.a. - The language of SOR 1.a. is correct but lacks evidentiary support showing a risk exists. Applicant was

explicit in describing his in-laws lives and their efforts to avoid contact with the FC government, with apparent success to date. Unlike situations in another DOHA case,[(3)] although Applicant has some feelings for the land of his birth, there is absolutely no evidence that Applicant has any feelings of affection or obligation to FC. In fact, I conclude, the evidence shows just the contrary to be the case. Based on the totality of the record, I find no basis for concluding that the in-laws are likely to be pressured by FC to persuade Applicant to do anything adverse to U.S. interests or that there is a risk he would accede to the pressure.

Specifically, Disqualifying Condition (1) applies in that his wife has parents and other siblings who are citizens of and reside in FC; and DC (2) applies, again, because of his wife, except that the evidence does not establish that the potential for adverse foreign influence or duress exists. To the degree that "potential"does exist, I conclude, under the totality of the evidence, that the evidence does not establish an "unacceptable security risk" (MC 1).

There is no evidence of (DC 3) relatives, cohabitants, or associates who are connected with any foreign government; (DC 4) any situation wherein Applicant was required to report the two foreign contacts; (DC 5) any unauthorized association with anyone connected with a foreign intelligence service; (DC 6) any conduct which may make Applicant vulnerable to coercion, etc. (DC 7) any effort by anyone, (including those involved in the two cited contacts) to increase Applicant's vulnerability to exploitation, etc.; and (DC 8) any financial interest of any kind. In addition to MC 1, I find MC 3 to be applicable since Applicant's contacts with his in-laws and remaining relatives in FC are deemed "casual and infrequent."

When Applicant was asked a hypothetical question by Department Counsel: "What would your reaction be if you were asked to work on a mission simulation that included air strikes on [FC], on oil fields, and so forth?" Applicant responded candidly. He had long thought about this possibility. He distinguishes between the FC government and its people. He resolved the dilemma by deciding he would remove himself from the situation. At first glance, this statement suggests some equivocation about his feelings and duty toward the U.S. He goes on to state, however, that he would not "do something against the Government and this nation. I owe too much to this country to do that (Tr at 137). As "far as at any time trying to do things that would harm this country, not at all, not even for a second" (Tr at 138).

I conclude Applicant was expressing his true intentions and his unblemished history in the U.S. indicates there is little or no risk he would ever fail to act appropriately in working with classified information and material. In addition, his claims are uncontroverted by any evidence suggesting that Applicant is likely to respond favorably to such pressure. Indeed, Applicant has emphatically stated that he would refuse to cooperate, but would immediately contact appropriate U.S. authorities.

SOR 1.b. and 1.c. These two allegations are problematic as possible disqualifying conditions. The SOR does not state why these two allegations should be construed as disqualifying and no substantive supporting evidence is apparent in the record. The Government's premise apparently is that an agent of FC or its opponents might contact Applicant again, some five to ten years after the first attempt and that Applicant might respond differently and agree to do something adverse to U.S. interests. Based on a totality of the evidence, I conclude that there is no substantial evidence that a risk exists that Applicant might change his mind. If the incidents show any preference, it is in favor of U.S. interests and not FC.

SOR 1.d. - There is no question that Applicant's wife is a citizen of FC. At the same time, she has resided in the U.S. since early 1998 and will be applying for U.S. citizenship next year as soon as she is eligible. By itself, this allegation is of minimal security significance, and viewed in the totality of the evidence, does not tend to establish the risk of foreign influence.

FOREIGN PREFERENCE (GUIDELINE C)

The underlying premise behind the Foreign Preference guidelines is that actions taken by an Applicant that tend to show a preference for another country (generally but not necessarily a country in which an applicant has dual citizenship with the U.S.) raise the possibility that the Applicant may be prone to provide information or make decisions that are harmful to the interests of the U.S. Indeed, DOHA case precedence supports this premise. It stands to reason, therefore, that the absence of such actions by a dual citizen may tend to show a preference for the U.S., rather than another country.

It is absolutely clear, however, that the crucial question is the overall meaning of what Applicant has done and said. I have considered, therefore, whether the evidence produced by the Government demonstrates actions and statements by Applicant tending to show that he has a preference for FC vis-a-vis the U.S. I first evaluated the evidence as to each SOR allegation, but rather than making a decision based on a piecemeal evaluation, I then proceeded to evaluate the totality of the evidence and used that overall analysis to make my decision as to Applicant's present eligibility for access to the nation's secrets.

The Appeal Board recognizes that while obtaining and using FC citizenship and an FC passport does carry negative security implications, " it is proper for [an] Administrative Judge to consider [an] Applicant's motivation in obtaining FC citizenship and an FC passport"[(4)] Additionally, the Administrative Guidelines require that an "Applicant's conduct be analyzed from the perspective of whether Applicant was expressing a foreign preference by using or possessing his FC passport"[(5)] In the same decision, the Appeal Board stated the totality of the evidence was such that an Administrative Judge could reasonably conclude the Applicant had not shown a preference for FC over the U.S.

As I understand the Board's reasoning in that case, the Applicant's obtaining and use of the a passport was a submission to authority, rather than a voluntary act, and the Applicant had not used it on any other occasions or for any other purpose.[(6)] In any case, the issue is not whether Applicant is or is not legally a dual citizen but, rather whether "Applicant shows a preference for a foreign country through action. See various Foreign Preference Disqualifying Conditions."[(8)] This latter language indicates that the existence or absence of Disqualifying Conditions 3 - 9 under Guideline C are relevant in determining whether Applicant's overall conduct establishes a foreign preference.

The Appeal Board has also made it clear that an Applicant who has "affirmatively sought and obtained citizenship and obtained and used an FC passport" has demonstrated conduct that "clearly falls within the Scope of Criterion [now Guideline] C and has negative security implications"[(9)] In such a case, "the burden of proof shift[s] to Applicant to demonstrate it is clearly consistent with the national interest to grant or continue a security clearance for him" (Id. at 2). This Appeal Board direction clearly applies in the present case, since Applicant is a FC citizen by reason of his birth there, but he did "voluntarily" obtain a FC passport.

SOR 2.a. and 2.b. - The Appeal Board recognizes that while obtaining and using FC citizenship and an FC passport does carry negative implications, " it is proper for [an] Administrative Judge to consider [an] Applicant's motivation in obtaining FC citizenship and an FC passport"[(10)]

Additionally, the Administrative Guidelines require that an "Applicant's conduct be analyzed from the perspective of whether Applicant was expressing a foreign preference by using or possessing his FC passport"[(11)] In the same decision, the Appeal Board stated the totality of the evidence was such that an Administrative Judge could reasonably conclude the Applicant had not shown a preference for FC over the U.S. As I understand the Board's reasoning in that case, the Applicant's obtaining and use of a FC passport was a submission to authority, rather than a voluntary act, and the Applicant had not used it on any other occasions or for any other purpose. I note the citation in the above case of an earlier decision in which the Appeal Board discussed a State Department policy of sanctioning "a dual citizen's use of a foreign passport to enter or leave the foreign country of which he is a citizen because the foreign country requires the dual citizen to do so."[(12)]

In any case, the issue is not whether Applicant is or is not legally a dual citizen, but rather whether "Applicant shows a preference for a foreign country through action. See various Foreign Preference Disqualifying Conditions."[(13)] This latter language indicates that the existence or absence of Disqualifying Conditions 3 - 9 under Guideline C are relevant in determining whether Applicant's overall conduct establishes a foreign preference.

Appeal Board precedent establishes that while "possession and use of a foreign passport are clearly of security significance," an Applicant's conduct must "be analyzed from the perspective of whether Applicant was expressing a foreign preference by using or possessing his FC passport.[(14)]

One of Applicant's exhibits (AX J) is a U.S. State Department "Consular Information Sheet," which specifically warns

U.S. citizens who are also dual citizens of Applicant's country of origin (1) that US-FC dual nationals have "often had their US passports confiscated upon arrival in [FC} and been denied permission to leave FC as U.S. citizens. The State Department advises such people to leave their U.S. passports at a U.S. embassy in another country, to enter and leave FC using a FC passport, and to retrieve their U.S. passport after leaving FC. Granted that citizenship is different from security clearance eligibility, but when the U.S. State Department tells people in Applicant's position to do exactly what Applicant did, i.e., use his FC passport to enter that country, his conduct has been directly sanctioned by the U.S. government and the advice makes any contention that Applicant acted out of preference or even convenience unreasonable.

Based on the totality of the record evidence, I conclude that nothing Applicant has done or said demonstrates a preference of any kind for FC over the U.S., nor does the factual record show any substantive ambiguity in his loyalty or commitment to the U.S. The fact he obtained a FC passport after becoming a naturalized U.S. citizen is certainly of security significance but the evidence as to why he did so establishes that he was acting reasonably out of perceived necessity and not for convenience or out of a preference for FC.

Specifically, his *exercise* of FC citizenship and his *obtaining and use* of the FC passport was the result of his belief that FC authorities would seize his U.S. passport and/or cause problems for him or those people he wanted to visit if he used it to enter and leave that country. Applicant acted out of fear of what FC authorities might do if he used his U.S. passport to enter and leave FC. I do not find this reason to be the equivalent of the "personal convenience" explanation that was rejected by the Appeal Board in ISCR Case No. 98-0252.[(15)] His conduct was not really voluntary and the passport was used to the lowest degree possible under the circumstances as Applicant reasonably saw them.[(16)] He did not hold himself out to be a FC citizen to anyone except FC authorities and then only because he felt he had no real choice.

In summary, Applicant obtained and used the FC passport only to enter and leave FC out of fear and for a limited purpose and he did not otherwise use it at all. Unlike what has occurred in other cases, Applicant did not, for example, enter third countries using the FC passport, nor did he conduct any business using the FC passport, nor did he receive any financial or educational benefits, or nor did he come within any other specified possible disqualifying conditions. Under these circumstances, I conclude Applicant's overall conduct did not show any preference for FC over the U.S. To the contrary, the totality of the evidence suggests that Applicant was attempting to prevent problems from occurring, e.g., his being drafted into the FC armed forces, being separated from his family, and being prevented from returning to the U.S.(all things he clearly wanted to avoid), while he was in FC.

SOR 2.c. and 2.d. are problematic as evidence allegedly showing, or tending to show, a foreign preference. Information about both incidents came directly and only from Applicant himself. The two incidents occurred five to ten years ago, and were the only two such incidents during the 21 years Applicant has lived in the US. It is not clear from the record why and how the government sees these two admitted allegations as tending to show a foreign preference.

I am persuaded that anyone of weaker character than Applicant would never have mentioned the two incidents, in part because no one would otherwise have ever known about them. From this fact I conclude that Applicant's revealing the two incidents shows a high degree of integrity, good judgment, reliability and trustworthiness, the very qualities we are seeking in someone applying for a security clearance. Based on the overall evidence in the record, and in particular because of the age and circumstances of the contacts, and Applicant's responses thereto, I do not find either incident to be adverse to Applicant's present eligibility to hold a security clearance.

SOR 2.e. and 2.f. - Travel to FC on several occasions using his FC passport does have security implications, but is mitigated by the surrounding facts and circumstances, as discussed above. The possibility that Applicant's might renew his FC passport had adverse significance, but has been mitigated by Applicant's current intentions.

Applicant has made two statements about his willingness to renounce his FC citizenship. In his response to the first Interrogatories, dated June 17, 1999 (GX 4), at 5: "State the degree of willingness (if any) that you have to formally renounce your citizenship with [FC] and to relinquish its passport," Applicant said:

[T]he only reason that I am holding a [FC] passport is for the purposes of traveling to [FC] because otherwise, it's

almost impossible to go to [FC] as an American. But, if it becomes absolutely necessary for me to hold my clearance and continue with my current employment, I am willing to renounce my [FC] citizenship.

At the hearing, Department Counsel mentioned Applicant's earlier statement about renouncing his FC citizenship (GX 4), in which Applicant said he would do so "if absolutely necessary" to "hold my clearance and continue my present employment" (Tr at 124). Department Counsel then asked: "Is this your testimony here today?" and Applicant responded: "Yes" (Id.). While the quoted statement is what Applicant said in GX 4, his original hearing testimony was actually that he was willing to renounce the FC citizenship, without reference to possible conditions. It is not clear whether Applicant understood the difference between the two statements or whether he was agreeing with what Department Counsel was quoting from GX 4 or was referring to his earlier hearing testimony. To the degree that Applicant's willingness to renounce his FC citizenship is deemed "conditional," it is still entitled to some weight and has been considered together with all other record evidence.

I do not find Applicant's responses to be contradictory, unclear or conditional. In essence, he has stated an unconditional willingness to renounce his FC citizenship and to relinquish his FC passport. The difference between what he said at the hearing and what he said to DSS in GX 4 is only whether he will do it with or without being asked by the Government. I do not find the difference to be significant. At the hearing, Applicant clearly expressed a willingness to renounce his FC citizenship, but was not asked to actually do so by Department Counsel. I conclude therefore that Applicant has fully met the requirement of C 4 by "expressing a willingness to renounce [his] dual citizenship.

In a 1999 case,[(17)] the Applicant stated that he would not use his FC passport if doing so would jeopardize his security clearance and would give it up, and that he would be willing to renounce his FC citizenship if he had to do so to retain a security clearance. The Appeal Board in the above case concluded that Applicant's statements did "not fall to the level of conflicting and equivocal statements by the Applicant in another foreign preference case."[(18)] At the same time, the Applicant's statements are arguably "conditional" in the sense that he would do so only if asked by the Government. That is substantially the case in the present matter. As the Appeal Board has pointed out:

As a matter of common sense (Directive Section F.3.), an unqualified or unconditional willingness to renounce foreign citizenship and give up a foreign passport should be given more weight than a qualified or conditional willingness to do so. Cf. Petition of Naturalization of Kassas, 788 F. Supp.993 (M.D. Tenn. 1992).[(19)]

This language indicates that even a "conditional" willingness to renounce is a positive factor entitled to some weight and must be considered in the context of the totality of the evidence, favorable and unfavorable.[(20)] This is not a situation where an Applicant states a willingness to renounce a foreign citizenship conditional on its being necessary to protect his clearance and/or job,[(21)] or if no longer necessary to protect foreign financial interests.

This case is different from most ISCR cases involving Guidelines B and C in that most applicants maintain their dual citizenship out of some affection toward the other country. In this case, Applicant has made clear, in no uncertain terms, that he dislikes and rejects the system now in place in FC. I am impressed with Applicant's obvious affection for the U.S. and his appreciation for what this country has allowed him to accomplish. I am also impressed by the care he has shown toward his family, bringing each of them to the U.S., and helping them get situated here. Applicant's financial, political, and philosophical ties to the U.S. are strong and growing.

His explanations and his long period of good conduct here demonstrate that no danger exists of his acting adverse to this county and its principles. He has established long and deep ties to the U.S. and is committed to this nation's well being. Considering the evidence as a whole, even if Applicant's willingness to renounce his FC citizenship and turn in his FC passport is deemed "conditional,"[(22)] and thus entitled to less weight, in the context of the totality of the record, Applicant has established mitigation and extenuation.

While Department Counsel argues Applicant's dual citizenship subjects him to the influence of FC, in addition to being evidence of his preference for that country, these arguments are general and can apply to anyone who holds dual citizenship. Department Counsel did an excellent job of developing the record beyond the language and contents of the SOR and supporting exhibits. However, the fully developed record lacks any specific substantial evidence, direct or

indirect, that a risk exists that Applicant is likely to act adversely to United States interests. I conclude that Applicant's activities have not demonstrated any preference for FC nor is their any substantial evidence that Applicant is likely to be influenced by FC to take any action adverse to U.S. interests.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

CRITERION B (Foreign Influence) For the Applicant

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. For the Applicant

Subparagraph 1.c. For the Applicant

Subparagraph 1.d. For the Applicant

CRITERION C (Foreign Preference) For the Applicant

Subparagraph 2.a. For the Applicant

Subparagraph 2.b. For the Applicant

Subparagraph 2.c. For the Applicant

Subparagraph 2.d. For the Applicant

Subparagraph 2.e For the Applicant

Subparagraph 2.f. For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

BARRY M. SAX

ADMINISTRATIVE JUDGE

1. The SOR, as contained in the file received by me, contains seven allegations under Guideline C (2.a.. - 2.g.). At the hearing, Department Counsel noted that SOR 2.f. and 2.g. were substantially similar and moved to strike SOR 2.f. There being no objection from Applicant, the request was granted and the former SOR 2.g. was redesignated SOR 2.f., so that there would be no gaps in the numbering of the allegations.

2. "Notwithstanding the whole person concept, pursuit of further investigation may be terminated by an appropriate adjudicative agency in the face of reliable, significant, disqualifying, adverse information (Directive, Enclosure 2, at E2.2.4., on p. 18).

3. E.G., Appeal Board Decision and Reversal Order, ISCR Case No. 98-0476 (December 14, 1999), at 4

4. Id., at 3

5. Appeal Board Decision and Reversal Order, ISCR Case No. 98-0476 (December 14 1999) at 2

6. The above decision cites a State Department policy of sanctioning "a dual citizen's use of a foreign passport to enter or leave the foreign country of which he is a citizen because the foreign country requires the dual citizen to do so." (7)

7. Appeal Board Decision and Reversal Order, ISCR Case No. 98-0252 (September 15, 1999) at 3, 4.

8. Appeal Board Decision and Reversal Order, ISCR Case No. 98-0252 (September 15, 1999) at 4.

9. Appeal Board Decision and Reversal Order, ISCR Case No. 99-0254 (February 16, 2000) at 2, 3.

10. Id., at 3

11. Appeal Board Decision and Reversal Order, ISCR Case No. 98-0476 (December 14 1999) at 2

12. Appeal Board Decision and Reversal Order, ISCR Case No. 98-0252 (September 15, 1999) at 3, 4.

13. Appeal Board Decision and Reversal Order, ISCR Case No. 98-0252 (September 15, 1999) at 4.

14. Appeal Board Decision and Reversal Order, ISCR Case No. 98-0476 (December 14, 1999) at 2.

15. Appeal Board Decision and Reversal Order, ISCR Case No. 98-0252, supra..

16. This is a positive factor. See Appeal Board Decision and Reversal Order, ISCR Case No. 98-0252 (September 15, 1999) at 4. (The negative conduct "consisted of two elements: use of a foreign passport [for convenience, including entry into third countries] and active ownership and participation in foreign business activities").

17. Id.

18. ISCR Case No. 98-0507(May 17, 1999).

19. Id. at 4.

20. Appeal Board Decision and Reversal Order, ISCR Case No. 98-0252 (Sept3ember 15, 1999) at 4, 5.

21. Appeal Board Decision and Reversal Order, ISCR Case No. 98-0507 (May 17, 1999) at 2, 4. In that case, there was conflicting evidence as to Applicant's intentions as to renunciation of FC citizenship. I find no such conflict ion in the present case.

22. See Appeal Board Decision and Reversal Order, ISCR Case No. 99-0254 (February 16, 2000) at 2.