

KEYWORD: Guideline C

DIGEST: In 2001 Applicant applied for and received Mexican citizenship in order to purchase property in Mexico. Applicant applied for voting rights in Mexico in order to obtain an identification card proving Mexican citizenship. There is a paucity of mitigating evidence Favorable decision reversed.

CASENO: 07-14151.a1

DATE: 09/10/2008

DATE: September 10, 2008

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In Re: )  
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----- ) ISCR Case No. 07-14151  
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Applicant for Security Clearance )  
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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 29, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline C (Foreign Preference) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On May 30, 2008, after considering the record, Administrative Judge Henry Lazzaro granted Applicant’s request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge’s favorable application of Foreign Preference Mitigating Condition (FPMC) 11(b) is unsupported by record evidence. Finding error, we reverse.

### **Whether the Record Supports the Judge’s Factual Findings**

#### **A. Facts**

The Judge made the following pertinent findings of fact: Applicant is a U.S. citizen by birth. Her parents were citizens of Mexico. Her father is now deceased, and her mother is a naturalized U.S. citizen who lives with Applicant in the U.S. Applicant’s husband was born in Mexico but has been a U.S. citizen since 1977.

In 2001 Applicant applied for, and received, Mexican citizenship. She did so in order to purchase property in Mexico, currently worth about \$15,000.00, for the purpose of eventually constructing a vacation home on it. Applicant applied for voting rights in Mexico in order to obtain an identification card proving her Mexican citizenship and in order to secure ownership of the land. She has not actually voted in Mexican elections. Applicant has no other connections to Mexico. “She asserts that her sole loyalty is to the United States and she is willing to renounce her Mexican citizenship if it is a condition of her obtaining a security clearance.” Decision at 3.

#### **B. Discussion**

The Appeal Board’s review of the Judge’s findings of fact is limited to determining if they are supported by substantial evidence—“such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive ¶ E3.1.32.1. “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620-21 (1966). In evaluating the Judge’s findings, we are required to give deference to the Judge’s credibility determinations. Directive ¶ E3.1.32.1.

Department Counsel has not challenged the Judge’s findings of fact. Applicant did not file a brief on appeal. Therefore, the Judge’s findings of fact are not an issue in this appeal.

### **Whether the Record Supports the Judge’s Ultimate Conclusions**

A Judge is required to “examine the relevant data and articulate a satisfactory explanation for” the decision, “including a ‘rational connection between the facts found and the choices made.’” *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). “The general standard is that a clearance may be granted only when ‘clearly consistent with the interests of the national security.’” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Appeal Board may reverse the Judge’s decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. “The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole.” *See, e.g.*, ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

The Judge concluded that Applicant, by stating she would renounce her Mexican citizenship, had met her burden of persuasion as to mitigation under Foreign Preference Mitigating Condition 11(b).<sup>1</sup> The Chief Department Counsel argues that Applicant’s willingness to renounce is conditional and, therefore, entitled to less weight than an expression of unconditional willingness to do so. *See, e.g.*, ISCR Case No. 99-0295 (App. Bd. Oct. 20, 2000). *See* ISCR Case No. 01-16098 at 3 (App. Bd. May 29, 2003). The Board has considered the Judge’s decision in light of his unchallenged findings of fact. Applicant chose to have the case decided upon the written record, with the result that her credibility could not be evaluated in the context of a hearing. *See* ISCR Case

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<sup>1</sup>Directive ¶ E2.11(b): “[T]he individual has expressed a willingness to renounce dual citizenship[.]” This mitigating condition is unchanged from the previous version of the Adjudicative Guidelines, found at Directive ¶ E2.A3.1.3.4. *See* ISCR Case No. 06-23453 at 4 (App. Bd. Nov. 14, 2007) (Prior precedent “remains valid where the applicable language of the guideline is unchanged or the changes are not of sufficient magnitude to vitiate or overrule the substance of the precedent.”)

No. 08-00899 at 3 (App. Bd. Jul. 29, 2008). Applicant did not to reply to the Government’s File of Relevant Material; nor did she submit a reply brief on appeal. Given the Judge’s unchallenged findings that Applicant actively acquired Mexican citizenship and that she registered to vote in Mexico; his unchallenged finding that she expressed merely a conditional willingness to renounce her Mexican citizenship; and the paucity of record evidence as to mitigation, the Board concludes that, on the facts of this case, Applicant has failed to meet her burden of persuasion under the *Egan* standard. *See* ISCR Case No. 99-0511 at 9 (App. Bd. Dec. 19, 2000) (The weight reasonably to be assigned an applicant’s willingness to renounce foreign citizenship should be determined in the context of the “clearly consistent with the national interest” standard.) The record, viewed as a whole, will not sustain the Judge’s favorable decision.

### **Order**

The Judge’s favorable security clearance decision is REVERSED.

Signed: Michael Y. Ra’anan  
Michael Y. Ra’anan  
Administrative Judge  
Chairman, Appeal Board

Signed: William S. Fields  
William S. Fields  
Administrative Judge  
Member, Appeal Board

Signed: James E. Moody  
James E. Moody  
Administrative Judge  
Member, Appeal Board